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1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 95-88888-cgm

4 - - - - - x

5 In the Matter of:

6 THE BANKRUPTCY LINK,

7 Debtor.

8 - - - - - x

9 Adv. Case No. 08-01789-smb

10 - - - - - x

11 SECURITIES INVESTOR PROTECTION CORPORATION,

12 Plaintiff,

13 v.

14 BERNARD L. MADOFF INVESTMENT SECURITIES, LLC. ET AL.,

15 Defendants.

16 - - - - - x

17 Adv. Case No. 10-04390-smb

18 - - - - - x

19 IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L.

20 MADOFF INVESTMENT SECURITIES LLC,

21 Plaintiff,

22 v.

23 BAM L.P., et al

24 Defendants.

25 - - - - - x

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1 Adv. Case No. 10-04377-smb

2 - - - - - x

3 IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L.

4 MADOFF INVESTMENT SECURITIES LLC,

5 Plaintiff,

6 v.

7 NELSON et al.,

8 Defendants.

9 - - - - - x

10 Adv. Case No. 10-05383-smb

11 - - - - - x

12 IRVING H. PICARD, ESQ., TRUSTEE FOR THE SUBSTANTIVELY

13 CONSOLIDATED SIPA LIQUIDATION OF BERNARD L. MADOFF

14 INVESTMENT SECURITIES LLC AND THE ESTATE OF BERNARD L.

15 MADOFF,

16 Plaintiff,

17 v.

18 SHAPIRO, et al.,

19 Defendants.

20 - - - - - x

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Page 3

1 Adv. Case No. 10-03800-smb

2 - - - - - x

3 FAIRFIELD SENTRY LIMITED (IN LIQUIDATION),

4 Plaintiff,

5 v.

6 FAIRFIELD GREENWICH GROUP, et al.,

7 Defendants.

8 - - - - - x

9

10 United States Bankruptcy Court

11 One Bowling Green

12 New York, NY 10004

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14 December 19, 2018

15 10:04 AM

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21 B E F O R E :

22 HON STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: SHEA

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1 HEARING re 08-01789-smb Application of Trustee and Baker &
2 Hostetler LLP for Allowance of Interim Compensation for
3 Services Rendered and Reimbursement of Actual and Necessary
4 Expenses Incurred from April 1, 2018 through July 31, 2018

5

6 HEARING re 08-01789-smb Application of Schiltz & Schiltz as
7 Special Counsel to the Trustee for Allowance of Interim
8 Compensation for Services Rendered and Reimbursement of
9 Expenses Incurred from April 1, 2018 through July 31, 2018

10

11 HEARING re 08-01789-smb Application of Higgs & Johnson
12 (Formerly Higgs Johnson Truman Bodden & Co.) as Special
13 Counsel to the Trustee for Allowance of Interim Compensation
14 for Services Rendered and Reimbursement of Expenses Incurred
15 from April 1, 2018 through July 31, 2018

16

17 HEARING re 08-01789-smb Twenty-Seventh Application of
18 Windels Marx Lane & Mittendorf, LLP for Allowance of
19 Interim Compensation for Services Rendered and Reimbursement
20 of Actual and Necessary Expenses Incurred From April 1, 2018
21 through July 31, 2018

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1 HEARING re 08-01789-smb Application of Soroker Agmon Nordman
2 as Special Counsel to the Trustee for Allowance of Interim
3 Compensation for Services Rendered and Reimbursement of
4 Expenses Incurred from April 1, 2018 through July 31, 2018

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6 HEARING re 08-01789-smb Application of Graf & Pitkowitz
7 Rechtsanwalte GMBH as Special Counsel to the Trustee for
8 Allowance of Interim Compensation for Services Rendered and
9 Reimbursement of Expenses Incurred from April 1, 2018
10 through July 31, 2018

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12 HEARING re 08-01789-smb Application of SCA Creque as Special
13 Counsel to the Trustee for Allowance of Interim
14 Compensation for Services Rendered and Reimbursement of
15 Expenses Incurred from April 1, 2018 through July 31, 2018

16

17 HEARING re 08-01789-smb Application of Young Conaway
18 Stargatt & Taylor, LLP as Special Counsel to the Trustee for
19 Allowance of Interim Compensation for Services Rendered and
20 Reimbursement of Actual and Necessary Expenses Incurred from
21 April 1, 2018 through July 31, 2018

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1 HEARING re 08-01789-smb Application of Williams, Barristers
2 & Attorneys as Special Counsel to the Trustee for Allowance
3 of Interim Compensation for Services Rendered from April 1,
4 2018 through July 31, 2018

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6 HEARING re 08-01789-smb Application of UGGC & Associes as
7 Special Counsel to the Trustee for Allowance of Interim
8 Compensation for Services Rendered from April 1, 2018
9 through July 31, 2018

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11 HEARING re 08-01789-smb Application of Browne Jacobson, LLP
12 as Special Counsel to the Trustee for Allowance of Interim
13 Compensation for Services Rendered and Reimbursement of
14 Actual and Necessary Expenses Incurred from April 1, 2018
15 through July 31, 2018

16

17 HEARING re 08-01789-smb Application of Eugene F. Collins as
18 Special Counsel to the Trustee for Allowance of Interim
19 Compensation for Services Rendered from April 1, 2018
20 through July 31, 2018

21

22 HEARING re 08-01789-smb Application of Robbins, Russell,
23 Englert, Orseck, Untereiner & Sauber LLP as Special Counsel
24 to the Trustee for Allowance of Interim Compensation for
25 Services Rendered from April 1, 2018 through July 31, 2018

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1 HEARING re 08-01789-smb Application of The Scaletta Law
2 Firm, PLLC as Special Counsel to the Trustee for Allowance
3 of Interim Compensation for Services Rendered from April 1,
4 2018 through July 31, 2018

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6 HEARING re 08-01789-smb Application of Werder Vigano as
7 Special Counsel to the Trustee for Allowance of Interim
8 Compensation for Services Rendered from April 1, 2018
9 through July 31, 2018

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11 HEARING re 08-01789-smb Trustees Motion for Authorization to
12 Depose Annette Bongiorno, Daniel Bonventre, and Joann Crupi

13

14 HEARING re 10-04390-smb Motion For (A) Expedited
15 Determination Of Motion For A Stay Of Trial Pursuant To Rule
16 501 1(C) Pending Ruling By The District Court On Defendants
17 Motion To Withdraw The Reference And (B) Granting A Stay

18

19 HEARING re 10-04390-smb Motion For (A) Expedited
20 Determination Of Motion For A Stay Of Trial Pursuant To Rule
21 501 1(C) Pending Ruling By The District Court On Defendants
22 Motion To Withdraw The Reference And (B) Granting A Stay

23

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1 HEARING re 08-01789-smb Hearing on Order to Show Cause Why
2 Trial in Adv. Proc. Nos. 10-04377 and 10-04658 Should Not Be
3 Consolidated

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5 HEARING re 10-05383-smb Motion to Quash

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7 HEARING re 10-03800-smb Status Conference

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25 Transcribed by: Sonya Ledanski Hyde

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17 DAVID J. SHEEHAN

18 NICK ROSE

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24 PATRICK MOHAN
25 DAVID J. SHEEHAN

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1 P R O C E E D I N G S

2 THE COURT: Please be seated.

3 CLERK: Madoff.

4 MR. CREMONA: Good morning, Your Honor. Nicholas
5 Cremona, BakerHostetler, appearing on behalf of the Trustee.
6 Your Honor, unless you're -- unless you have a preference, I
7 would suggest that we go in the order of the agenda and deal
8 with the uncontested matters first starting with the fee
9 applications.

10 THE COURT: Oh, I certainly want to hear the fee
11 applications because I want Mr. Bell to tell me how long
12 this case is pending. Okay.

13 MR. CREMONA: Fair enough. I'll cede the podium
14 to Mr. Sheehan and Mr. Bell.

15 THE COURT: All right. Thank you.

16 Mr. Bell, I don't think I have to use days
17 anymore. You can start to use years and percentages of
18 years.

19 MR. BELL: I'm ready for you.

20 THE COURT: Okay. I know you've been planning for
21 this one.

22 MR. BELL: I'll forewarn you that he's down to
23 seconds on this one.

24 THE COURT: All right. Well --

25 MR. SHEEHAN: Okay. Your Honor, this is the

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1 return date of 28th fee application by the Trustee. My name
2 is David Sheehan. I'm here representing BakerHostetler, of
3 course, and the Trustee Irving Pacard as well as a number of
4 foreign fee applicants and a conflict counselor that have
5 assisted us throughout this case as well as appellant
6 counsel who have assisted us in connection with the Second
7 Circuit appeal on extraterritoriality.

8 As with the past, what I think I will do this
9 morning is Your Honor is intimately familiar with what's
10 happening in the United States since it's here every week
11 with you. So I won't go through that now, Your Honor has
12 it, except to note that we are -- we do have an allocation
13 pending before Your Honor to again distribute over half a
14 billion dollars, which I think is significant when you think
15 about the fact that it's the tenth year into this case and
16 they're still retrieving those sums of money and
17 distributing them to customers.

18 The two things that I'd mention are these.
19 There's been a tremendous amount of activity in the Kingate
20 case, and you will see reflected in the time of Browne
21 Jacobson and the attorneys also in Bermuda. A lot of
22 discovery has taken place as Your Honor knows from signing
23 those orders that allow us to have discovery overseas. We
24 ran into quite a bit of activity in the UK, which our
25 counsel was heavily involved in. It's all been resolved,

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1 and we're moving towards the end of discovery. As Your
2 Honor knows, next month hopefully it'll be concluded.

3 We also have an interesting case occurring between
4 defender and HSBC in Ireland where they're taking the
5 position --

6 THE COURT: In where?

7 MR. SHEEHAN: In Ireland. Ireland.

8 THE COURT: Oh, Ireland. I thought you said --

9 MR. SHEEHAN: Ireland.

10 THE COURT: I thought you said Orica.

11 MR. SHEEHAN: No, no. My nose is a little stuffy.
12 But in any event, it's Ireland. And what the suit there is
13 HSBC is trying to find some favor in the fact that defender
14 settled with us and that that should benefit them. Very
15 interesting proceeding. We're monitoring that. It has not
16 been decided as yet.

17 And then the other counsel, of course, have
18 continued their work supporting us in France and other
19 jurisdictions where there are criminal proceedings taking
20 place, and we participate with them in those proceedings,
21 give access to information and statements and evidence that
22 assists us in the litigation in the United States.

23 Then, lastly, there is the lawsuit in Magnify,
24 which Your Honor is very familiar with since you wrote the
25 opinion on the motion for summary judgment. There's a lot

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1 of activity in Israel as well. Motion practice mostly, but
2 what's happening now is we're making an effort to try to
3 follow in Your Honor's opinion to convene settlement
4 discussion with the other side in Israel to resolve both
5 litigations if we can. Your Honor will probably hear that
6 Magnify counsel in the next couple of days as well.

7 So, overall, I would like to say that there's no
8 objection to the fee application. We, of course, admire and
9 hope the -- support where we see for our conflicts counsel,
10 in particular (indiscernible). And I would respectfully
11 submit that the order should be entered approving the
12 applications.

13 THE COURT: Thank you.

14 MR. SHEEHAN: Thank you, Your Honor.

15 MR. BELL: Good morning, Your Honor.

16 THE COURT: Good morning.

17 MR. BELL: Kevin Bell on behalf of the Securities
18 Investor Protection Corporation. As we begin the eleventh
19 year of this liquidation proceeding, and that began last
20 week, we are in the 121st month of this proceeding. And as
21 you saw by the motion filed by the Trustee for the tenth
22 allocation and distribution, the success in getting money
23 back to the victims in this case continues apace.

24 THE COURT: So what's the percentage distribution
25 other than those who have been paid in full because of SIPC

1 insurance or --

2 MR. BELL: Well, as you will see in the
3 application, we're approaching anybody who had a claim of a
4 million and a half dollars has been fully paid. And
5 pursuant to the statute when they get fully paid, the money
6 that SIPC advances return to SIPC and it subrogation rights.
7 So we move apace with regard to that as the Trustee is
8 successful as you approve settlement agreements of large
9 numbers and as pursuant to the -- what Judge Lifland entered
10 in the proceedings on the settlements. We are able to
11 effect settlements of -- in lower amounts. The Trustee has
12 successfully and we move in exorable pace of reducing the
13 number of these good faith cases. You entered orders this
14 morning, Your Honor, the voluntary dismissal of further
15 actions that were commenced a long time ago.

16 Today is day 3,660. As you have requested, Your
17 Honor, we're at 87 -- approximately, I don't know the -- I
18 don't go to the exact second -- 87,840 hours. Last time you
19 asked for --

20 THE COURT: That's more detail than I really --

21 MR. BELL: Last time you asked for minutes and
22 seconds, and I'm prepared to give --

23 THE COURT: I'm sure I didn't, but okay.

24 MR. BELL: I'll defer on that.

25 THE COURT: All right.

1 MR. BELL: I just have them said -- you had said
2 minutes and seconds last time.

3 THE COURT: It must have been relevant to some
4 dispute.

5 MR. BELL: SIPC when it reviews the applications,
6 reviews each and every time entry of every application. We
7 do that hard copy, not electronically. And we make comments
8 regarding the applications to the various counsel. And
9 there are accommodations made and discussions held. And
10 I'll focus in on Baker Hoffstetler. If you look at the
11 fifth paragraph of SIPC's recommendation, you will see
12 beyond the 10 percent reduction in their rates, the total
13 reduction of what they would bill of the clients is 14.9
14 percent. If you go over the recommendation on Windell's at
15 paragraph 3, the total adjustment in their usually billing
16 rates is 17.18 percent. And as we go through each and every
17 one of the applications, there have been adjustments or
18 counsel anticipates the potential adjustments by addressing
19 concerns that SIPC has raised in the past.

20 Because of the long agenda, Your Honor, I would
21 submit that under the statute, the standard in a no-asset
22 case where there is no reasonable expectation by the Trustee
23 at this particular moment in time, that we will get to fully
24 satisfy customers and have a general estate, that SIPC would
25 submit that its recommendation that you enter the order

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1 submitted, that will be submitted by the Trustee on all
2 these applications.

3 THE COURT: Thank you.

4 MR. BELL: Do you have any further questions, Your
5 Honor?

6 THE COURT: No.

7 MR. BELL: Thank you.

8 THE COURT: Is there anyone else who wants to be
9 heard in connection with the fee applications?

10 MR. SHEEHAN: I don't think so, Your Honor. But I
11 do want to answer the question Mr. Bell artfully avoided and
12 that is --

13 THE COURT: I noticed the avoidance.

14 MR. SHEEHAN: Yeah, I know. We were at 75 to
15 begin with, and we distributed about 65 percent to those 75.
16 However, as you know, many of the feeder funds are indeed
17 the losers. So when we settle with them, we pay their
18 claims. So the amount of claims have risen slightly above
19 \$19 billion. So it's more like in the 64 percent range.
20 There, 75 percent range if you use the 75. But I don't
21 think 75 really is accurate anymore, although it's widely
22 reported and talked about all the time. We're more in the
23 65 percent range with the denominator going up to 19
24 billion.

25 THE COURT: Okay.

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1 MR. SHEEHAN: Thank you.

2 THE COURT: Thank you very much.

3 MR. SHEEHAN: Thank you.

4 THE COURT: Based upon SIPC's recommendation in
5 the absence of a reasonable expectation that this is going
6 to be a 100 percent plus case, I will approve the fee
7 application and you can submit an order. Thank you.

8 MR. SHEEHAN: Thank you, Your Honor.

9 THE COURT: Thank you.

10 What's next, Mr. Cremona?

11 MR. CREMONA: Your Honor, the next matter on the
12 agenda is the Trustee's motion pursuant to Rule 30 to depose
13 certain incarcerated former employees of (indiscernible),
14 namely Buongiorno Von Ventry and --

15 THE COURT: I know it's unopposed, but I have that
16 question before me about and objections to continuing
17 discovery in the other cases. Does it make sense to resolve
18 that first?

19 MR. CREMONA: Well, Your Honor, I would submit
20 that these cases are different for a couple of reasons.
21 We've noticed this motion in 17 cases that have open
22 discovery.

23 THE COURT: I understand discovery. I meant
24 arguing with you about the fact that discovery is still
25 open. I'm just wondering whether it makes sense to first

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1 determine whether or not the other 90 cases or whatever the
2 number is will participate in any of these exams.

3 MR. CREMONA: Well, Your Honor, we would -- we
4 proposed that initially. We would have been happy to do
5 that. We're happy to do that if Your Honor thinks that's
6 best. What -- just to give you our rationale on why we
7 filed it now, we have discovery open. That closes in
8 February. We don't believe that these depositions will push
9 those dates out. We also don't know because discovery's
10 open whether or not these defendants will take discovery
11 with warrants.

12 There's testimony, and we don't know whether or
13 not they're going to contest the Ponzi scheme, but we don't
14 have any reason to believe that they're not.

15 THE COURT: Okay.

16 MR. CREMONA: So for those reasons, Your Honor, we
17 do believe it's important to move forward with these
18 depositions.

19 THE COURT: All right. Well, does anyone want to
20 be heard in connection with this motion? Since the
21 defendants in those actions don't object, I'll grant the
22 motion. I note that there was no opposition. And I'll sign
23 the order in chambers.

24 MS. COSTER: Your Honor?

25 MR. CREMONA: Thank you, Your Honor.

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1 THE COURT: Yes. Oh, I'm sorry.

2 MS. COSTER: Good morning. I'm Abigail Coster.

3 I'm here from Schulte Roth & Zabel on behalf of the

4 (indiscernible) parties.

5 THE COURT: Yes.

6 MS. COSTER: And we do not have any objection to
7 the relief requested by the Trustee but just to go on the
8 record. We filed a letter on December 10th, and we just
9 respectfully request that the Court for any depositions that
10 are authorized to -- the order to contain language that has
11 been similar to language that's been in the past --

12 MR. CREMONA: Your Honor? Your Honor, if I may?

13 THE COURT: Is it in --

14 MR. CREMONA: If I may?

15 THE COURT: -- the draft order?

16 MR. CREMONA: Yes.

17 THE COURT: Because I'm not going to enter another
18 order.

19 MR. CREMONA: Your Honor, let me just clarify. We
20 had reached, and I -- sorry, I should have said this. We
21 had reached agreement with Schulte Roth to put all the
22 (indiscernible) provisions that were in Madoff deposition
23 order. They mirror that. We had reached agreement with
24 Schulte, and we modified the orders and we submitted those
25 modified orders that reflect all of those provisions by way

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1 of CNL. And those are the orders that Your Honor has.

2 THE COURT: Have you seen those orders?

3 MS. COSTER: We have. And --

4 THE COURT: All right. Do you have any objection
5 to those orders?

6 MS. COSTER: We do not.

7 THE COURT: Okay. Thank you.

8 MR. CREMONA: Moving forward, Your Honor --

9 THE COURT: Okay.

10 MR. CREMONA: -- the next matter on the agenda
11 deals with the (indiscernible) proceeding.

12 THE COURT: All right.

13 MR. CREMONA: And just by way of background there,
14 Your Honor, we are here again on this matter based on an
15 emergency motion to stay the trial given the pendency of the
16 Defendant's motion to withdraw the reference.

17 THE COURT: What's the schedule now in the
18 district court? Because I saw letters extending the
19 schedule --

20 MR. CREMONA: Sure.

21 THE COURT: -- or it looked like the schedule was
22 extended.

23 MR. CREMONA: The schedule is that we, the
24 Trustee, has to file his opposition brief by December 30.
25 And I'm not exactly sure when the Defendants are required,

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1 but I want to say mid-January.

2 MS. NEVILLE: It is mid-January, but I don't have
3 the date with me, Your Honor.

4 THE COURT: All right. And is -- there's no
5 specific argument date, I assume?

6 MS. NEVILLE: No.

7 MR. CREMONA: There is not.

8 THE COURT: Okay.

9 MR. CREMONA: So, Your Honor, we're here because
10 on 11/28, the Manns made an oral motion to withdraw their
11 claims and objections with prejudice which Your Honor
12 granted. And then that led Your Honor to direct the parties
13 to brief the issue, the legal effect of the claims
14 withdrawal and the objection withdrawal with prejudice,
15 which is what we're here to discuss today.

16 THE COURT: Right.

17 MR. CREMONA: And if Your Honor will allow me, I'd
18 like to amplify our briefs by talking about four points.
19 First, just a brief historical context of the claims and the
20 law in this case because I think that's important when we
21 evaluate the jurisdiction, the cases, and their applications
22 here. Second is the Defendant's submission to this Court's
23 equitable jurisdiction and the effect of that. And then,
24 thirdly, the effect or lack of effect of the withdrawal of
25 the claims and objections with prejudice. And then, lastly,

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1 the factual effect of the withdrawal of those claims with
2 prejudice and the res judicata implications which may or may
3 not implicate what's even left for this Court to determine
4 based on those admissions in our view.

5 But I understand Ms. Neville and the Manns will
6 disagree. But just by way of background, we first early on
7 in this case, which I think it's important to point out,
8 this Court entered an order that made it quite clear that
9 the filing of a proof of claim submitted that claimant to
10 this Court's equitable jurisdiction and put everyone on
11 notice that that was a volitional act, that it was a
12 tactical choice that all defendants had to make in the face
13 of -- or all claimants had to make in the face of avoiding
14 --

15 THE COURT: But the argument is that it was
16 certainly a submission to the Court's equitable jurisdiction
17 with respect to determining the claim and any issues that
18 went into determining the claim. The argument now is, well,
19 we've withdrawn our claim or we're not going to litigate it
20 or whatever you want to call it. So this lawsuit can't be
21 part of the claims resolution process because there is no
22 claim to resolve anymore. That's the essence of your
23 argument.

24 MR. CREMONA: I understand. But I think there are
25 number of steps that you have to go through to get there,

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1 Your Honor. I mean we mentioned in our papers you have
2 (indiscernible), you have (indiscernible).

3 THE COURT: But they didn't present this
4 situation. I don't know -- and I'll ask Ms. Neville whether
5 the disputes that when this adversary proceeding was filed,
6 the Court had equitable jurisdiction to decide it.

7 MR. CREMONA: Can I establish certain fundamental
8 principles?

9 THE COURT: Sure.

10 MR. CREMONA: In June of 2009, these claimants
11 filed customer claims. In November 2010, the Trustee filed
12 this avoidance action. There is no dispute that those
13 claims at that point in time were pending. And what
14 (indiscernible) requires and it teaches is that if that
15 proof of claim, that claimant is met with an avoidance
16 action, whether it's a preference or a fraudulent transfer
17 -- they are deemed to be the same -- that claim at that
18 point becomes part of the claims allowance process, that
19 claim being the --

20 THE COURT: Yes adversary proceeding.

21 MR. CREMONA: -- avoidance action.

22 THE COURT: Correct.

23 MR. CREMONA: And that invokes the debtor/creditor
24 relationship. That is the law based on Langenkamp. That is
25 unchanged by Stern. So --

1 THE COURT: I agree with you on that.

2 MR. CREMONA: Okay. So --

3 THE COURT: Since you raised Stern, let me ask you
4 a question about Stern.

5 MR. CREMONA: Sure.

6 THE COURT: Why didn't Mr. Marshall submit to the
7 equitable jurisdiction of the bankruptcy court on the
8 counterclaim by the debtor when he filed the proof of claim?

9 MR. CREMONA: Because there the Court went to
10 great lengths to distinguish that situation from Langenkamp.
11 Those claims were completely unrelated. It was a state law
12 tort claim, not a bankruptcy claim. If Your Honor will
13 allow me, why I want to talk about the history of the law of
14 this case, there is no more apt situation to say that two
15 claims and -- the adversary and the claims are inextricably
16 intertwined.

17 What we have here, and I think it's important to
18 point out the background, while that claim was pending, the
19 Hine -- excuse me, the Manns participated in the
20 (indiscernible) decision by Judge Rakoff through the Hine
21 case which is one of the lead cases.

22 Judge Rakoff found in (indiscernible) that the
23 calculation of avoidance liability and the calculation of
24 net equity are the same. And Your Honor in your Cohen
25 decision said exactly that. And, you know, I could read to

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1 you the quote where you said exactly that. So the point is,
2 and we've also -- and I think on --

3 THE COURT: I think we had this discussion.

4 MR. CREMONA: We did on September 26th --

5 THE COURT: Right.

6 MR. CREMONA: -- Your Honor actually said the
7 calculations are exactly the same. So --

8 THE COURT: I asked Ms. Neville how they were
9 different and --

10 MR. CREMONA: Well --

11 THE COURT: -- they aren't.

12 MR. CREMONA: Well, she can assert that, but
13 that's further amplified by this, Your Honor. The Trustee's
14 determination of net equity has an Exhibit A. That Exhibit
15 A lists all the transactions. The complaint has an Exhibit
16 B, lists the same transactions. If you put them side by
17 side, they're the same. The math is the same. It's based
18 on the net, the netting of the account over the life -- the
19 netting of the deposits and withdrawal over the life of the
20 account.

21 One is an adjudication of avoidance liability, and
22 the other is an adjudication of net equity. So my point is
23 here, this Court, the district court, any court, there's no
24 court that can adjudicate a defendant's final avoidance
25 liability while at the same time not simultaneously

1 adjudicating their negative net equity.

2 So I raise that all because that is precisely a
3 scenario under Stern where those two claims, the adversary
4 and the claim, are inextricably intertwined. There's no way
5 to separate the two. And under that scenario, Your Honor
6 has final adjudicative authority. And I think it cuts
7 through all of that. And that's what Judge Daniels said in
8 his recent decision. And, frankly, that's the reason why
9 we're here talking about a withdrawal of the claim. This
10 withdrawal is blatantly in the face of Judge Daniels
11 decision. It's absolutely gamesmanship. It's precisely the
12 scenario that we discussed in EXDS that we discussed over
13 the last three hearings that the Court said was improper.

14 I mean this -- I guess to boil it down, Your
15 Honor, this Court's jurisdiction cannot fluctuate based on
16 the whim of the claimant. And that's what would happen
17 here. So I mean we can go through all the arguments, which
18 I'd like to do, but I mean we also assert that there's a
19 setoff claim here which is a live claim. And that setoff
20 claim is tantamount to a proof of claim. And if -- and Your
21 Honor recognized this in Cohen as well -- if you give
22 dollar-for-dollar credit to these affirmative defenses,
23 these setoffs, that is tantamount to giving net equity
24 claims.

25 So, again, that's another basis under Stern to say

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1 that Your Honor has final adjudicative authority because
2 that absolutely implicates the claims allowance process.
3 There's no way to separate those two. And we didn't get a
4 fair -- I mean the Defendant's papers don't really
5 adequately address that. The (indiscernible) case in this
6 district says exactly that if you assert a counterclaim,
7 it's tantamount to a proof of claim which subjects that
8 defendant to this Court's equitable jurisdiction.

9 And now no matter -- okay, so that other claim's
10 been withdrawn with prejudice. Now next week, they're going
11 to withdraw the affirmative defense and Your Honor's --

12 THE COURT: Maybe they'll do it today.

13 MR. CREMONA: Right. And then you no longer have
14 jurisdiction. That cannot be. That cannot be the law. So,
15 Your Honor, I may not have a lot more I'd like to get
16 through, but I do think that the Court ought to look at the
17 legal effect of the withdrawal of a claim.

18 We've gone through that. You asked us to look at
19 that. We've cited to this Court numerous cases, EXDS,
20 Enron, Worldcom. Judge Gonzalez looked at that scenario in
21 both of those cases and found that essentially you can't
22 unring the bell. You've submitted to jurisdiction, you
23 filed the proof of claim. You can't subsequently withdraw
24 that when it suits you. You can't, as these Defendants have
25 here, invoke this Court's equitable jurisdiction to

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1 participate in the custom of property fund to the extent of
2 their net equity which it turns out they have none, but --
3 and then later or simultaneously preserve your right to a
4 jury trial. The law prohibits that. And that's what
5 Langenkamp said. That's what EXDS says.

6 And there's nothing in Stern that changes that.
7 In fact, I think Stern reinforces that based on the reasons
8 we just talked about because there is no other scenario I
9 can think of where two claims are more inextricably
10 intertwined than new equity and avoidance liability and
11 value under 548(c) in this case. So I mean there are -- we
12 don't want to use two sides of the same coin, but Your Honor
13 used that term in Cohen. They're mirrored images of one
14 another. Whatever you want to call it, the math is exactly
15 the same.

16 And we have to -- we have to look at these other
17 cases through that lens. I mean you can't ignore -- we're
18 not writing on a clean slate here. We're ten years in.
19 There's a law of this case which governs how this Court
20 exercises jurisdiction.

21 THE COURT: Okay.

22 MR. CREMONA: Thank you. Well, can I make one
23 last point on --

24 THE COURT: Make one last point. I guess -- you
25 know, I got your argument.

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1 MR. CREMONA: Well, the only other point is on the
2 withdrawal of the claim with prejudice, I think that has
3 factual implications which go to whether or not there's a
4 jury trial, right, which I don't believe there is based on
5 all the case law we've cited. But the point is they've
6 withdrawn the claim and objection with prejudice. The
7 result of that is under the claims procedures order, they
8 are now bound by the Trustee's determination. And that has
9 certain legal consequences which I think Your Honor alluded
10 to last time we were here, not the least of which is --

11 THE COURT: It would be more than the Trustee's
12 determination. If they had not responded to the Trustee's
13 determination, their claim would be stricken. Arguably, the
14 withdrawal with prejudice would also use a adverse
15 determination on the various defenses.

16 MR. CREMONA: Exactly. That's where I was going,
17 Your Honor. The determination says -- I guess let me put it
18 this way.

19 THE COURT: It's not really the order so much as
20 the withdrawal of claim with prejudice. Does that also mean
21 that, you know, collateral estoppel precluded from asserting
22 those items -- those defenses raised in the response.

23 MR. CREMONA: That is what I would like to point
24 out. I believe that they are. The fact is the
25 determination provides that they've agreed now to the

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1 Trustee's net equity. That is predicated on the fact that
2 this is in fact the Ponzi scheme. That is what allows the
3 Trustee to calculate net equity in the manner in which he
4 does. The Second Circuit approved of that calculation.

5 So I would submit that they have conceded it's a
6 Ponzi scheme. The Trustee's determination also says that no
7 trades were made on behalf of any of these accounts.
8 They've conceded to that. The determination letter also
9 says, and I know Your Honor had read a lot of these. It
10 also says you were paid with fictitious profits from other
11 people's money. All of those matters in our view are now
12 res judicata and collaterally estopped.

13 I raise all of that to say that now there is no
14 factual issue for any jury to determine. All that's left
15 are legal issues.

16 THE COURT: Are you proposing that assuming I
17 decide that I still have equitable jurisdiction that you're
18 going to make a motion for summary judgment?

19 MR. CREMONA: I am. But I think, Your Honor, it's
20 important for you to determine that you still have equitable
21 jurisdiction and --

22 THE COURT: I understand that.

23 MR. CREMONA: -- no, no, I'm sorry. Let me --

24 THE COURT: Well, actually you could still move
25 for summary judgment even if I didn't.

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1 MR. CREMONA: But my point is I agree --

2 THE COURT: Because I still want subject matter
3 jurisdiction.

4 MR. CREMONA: You always have.

5 THE COURT: Yeah.

6 MR. CREMONA: But my point is you have final
7 adjudicative authority, so that is a distinction which still
8 warrants decision on this point because then the summary
9 judgment is a final order as opposed to a ruling and
10 recommendation.

11 THE COURT: All right. Thank you.

12 MR. CREMONA: But just to close, Your Honor, we
13 are prepared expeditiously to move for summary judgment.

14 THE COURT: Okay.

15 MR. CREMONA: If that's how the Court wants to
16 proceed.

17 THE COURT: All right.

18 MR. BELL: Briefly, Your Honor. SIPC's strongly
19 supports the Trustee's position and stands on its
20 memorandum.

21 THE COURT: Thank you very much.

22 MS. NEVILLE: Carole Neville and again --

23 THE COURT: Well, let me ask you a question
24 because I know where I'm going to begin.

25 MS. NEVILLE: Can I just introduce myself for the

1 record?

2 THE COURT: Sure. Go ahead.

3 MS. NEVILLE: Carole Neville from Dentons on
4 behalf of the Defendants.

5 THE COURT: Do you dispute that when the adversary
6 proceeding was filed, this Court had equitable jurisdiction
7 to make a final determination forgetting about when Stern
8 was decided, but had equitable jurisdiction to decide this
9 adversary proceeding because it was part of the claims
10 allowance process?

11 MS. NEVILLE: Well, I never thought it was part of
12 the claims allowance process, and that's why --

13 THE COURT: Okay. Tell me more about that.

14 MS. NEVILLE: -- Your Honor and I have kind of
15 played this game --

16 THE COURT: Because they didn't assert a 502(d)
17 claim.

18 MS. NEVILLE: No. They didn't even assign -- they
19 didn't even assert an objection to claim. They did nothing.
20 In fact, they advocated --

21 THE COURT: Well, but the determination was their
22 objection.

23 MS. NEVILLE: No. Here's the difference. If you
24 have -- I assert a claim based on my contract.

25 THE COURT: Right.

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1 MS. NEVILLE: The Trustee said breach of contract,
2 fraudulent conveyance, whatever. Those two things are
3 intimately related. I asserted a claim for net equity.
4 They came back and said I'll take care of your claim in the
5 claims allowance process. You owe me money. And my answer
6 is not I have a net equity claim, but I have a legitimate
7 contract right under federal securities law.

8 They're not met. There was no joinder. There was
9 no joinder formally, and there was no joinder --

10 THE COURT: But you know?

11 MS. NEVILLE: -- substantively.

12 THE COURT: Can I interrupt you? A lot of the
13 cases that I've read talk about a submission to equitable
14 jurisdiction without regard to whether there's an objection
15 or not. That is once you file a claim, you're in for
16 everything.

17 MS. NEVILLE: I know. But I think that when
18 looking at these cases, first of all, Second Circuit law
19 says the filing of a claim is not a submission to equitable
20 jurisdiction for all purposes.

21 THE COURT: Right.

22 MS. NEVILLE: It says that --

23 THE COURT: So in the Stern situation, it's not a
24 submission. That's why I asked (indiscernible) the
25 question.

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1 MS. NEVILLE: Well, it says it has to involve the
2 claims allowance process.

3 THE COURT: Okay. And you're --

4 MS. NEVILLE: And they didn't.

5 THE COURT: -- and you're saying that when this
6 adversary proceeding was filed, it did not implicate the
7 claims allowance process?

8 MS. NEVILLE: That's correct.

9 THE COURT: Okay.

10 MS. NEVILLE: Okay. Now let me just add one point
11 to that. Judge Lifland had already entered an order in the
12 Mann -- with respect to the Mann claim striking the net
13 equity, striking the objection, and denying the net equity.
14 So we already by the time they filed the adversary had a
15 denial of the net equity claim.

16 THE COURT: Yeah. But you were also contesting
17 the deposits and withdrawals; weren't you?

18 MS. NEVILLE: Yes, at that point it was.

19 THE COURT: So there was a live claim, correct?

20 MS. NEVILLE: But there was a substantive
21 determination.

22 THE COURT: It's like a motion for partial summary
23 judgment.

24 MS. NEVILLE: Right.

25 THE COURT: It's still a live dispute.

1 MS. NEVILLE: Okay.

2 THE COURT: Just one of the issues was resolved.

3 MS. NEVILLE: But they did have the option in
4 every single one of those cases that they cite, every single
5 one of them has either a claims allowance dispute in the
6 adversary or 502(d). So --

7 THE COURT: But, you know, 502(d) doesn't -- if
8 they prevail in their fraudulent transfer suit, 502(d)
9 doesn't give me any discretion. It says the claim is
10 disallowed.

11 MS. NEVILLE: I know, but you know, they couldn't
12 have had a 502(d) claim if we had a negative net equity. So
13 they couldn't have a claims allowance --

14 THE COURT: You are always contesting and until I
15 saw the proposed pretrial order, I thought you were always
16 contesting the deposits and withdrawals.

17 MS. NEVILLE: You know, Your Honor, in this case,
18 we didn't have -- and, in fact, in all of the cases, we
19 didn't have all of the documents. The Trustee is the only
20 one who had them. Once --

21 THE COURT: You didn't have the documents relating
22 to your deposits and withdrawals?

23 MS. NEVILLE: A lot of my clients don't.

24 THE COURT: Did you ever -- I mean, you know, I've
25 seen in other contexts, Mr. (indiscernible) expert reports

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1 and Ms. (indiscernible) expert reports. And they document
2 with Bates numbers every single deposit and withdrawal it
3 looks at.

4 MS. NEVILLE: Yes. But, you know, some of these
5 deposits went back a decade. So you didn't know for sure.
6 The people are in their 80s and 90s. This --

7 THE COURT: Okay. So you're still contesting the
8 deposits and withdrawals?

9 MS. NEVILLE: But no, no. No, when we -- and --

10 THE COURT: So what are you --

11 MS. NEVILLE: -- for the Manns, no.

12 THE COURT: What do you think that's the --

13 MS. NEVILLE: We're not contesting it. And, first
14 of all, you made an invitation for me to withdraw the claim.

15 THE COURT: Right.

16 MS. NEVILLE: I didn't think we even needed to.

17 If I had thought we needed to --

18 THE COURT: You want to --

19 MS. NEVILLE: -- I would have made the motion.

20 THE COURT: -- withdraw your withdrawal?

21 MS. NEVILLE: No, because it doesn't matter.

22 THE COURT: Okay.

23 MS. NEVILLE: The claim was finally disallowed,
24 and these cases --

25 THE COURT: I don't understand how you can keep

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1 saying that when you were continually contesting the factual

2 --

3 MS. NEVILLE: We're not contesting anything
4 anymore. We're not contesting anything. There were two
5 Second Circuit decisions that decided the two main issues
6 which was net equity and adjustment to net equity. And
7 we're not contesting the ins and outs. So what's left?
8 What's left?

9 THE COURT: So what's the factual dispute that has
10 to be tried?

11 MS. NEVILLE: Because that's not the claim --
12 that's not the defense. And that's what --

13 THE COURT: What's the factual dispute that has to
14 be tried in this adversary proceeding?

15 MS. NEVILLE: Well, there are two things. One,
16 whether there's a Ponzi scheme, which I absolutely dispute
17 and we have conceded it.

18 THE COURT: Well, they contend that by withdrawing
19 your claim with prejudice, you --

20 MS. NEVILLE: I'm conceding everything?

21 THE COURT: Go ahead. Finish up.

22 MS. NEVILLE: No, I --

23 THE COURT: If you keep interrupting me --

24 MS. NEVILLE: Sorry. I'm sorry.

25 THE COURT: Go ahead.

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1 MS. NEVILLE: It's frustrating, though, because
2 we're hearing the other side of the coin thing ad nauseum,
3 and it isn't the other side of the coin. The defense under
4 548(c) is a radically different thing than net equity. And
5 that's just such a fundamental thing.

6 THE COURT: But that's not what we're talking
7 about. The other side of the coin argument is the
8 computation of net equity and fictitious profits. And I
9 remember specifically asking you the last time what's the
10 difference, and you couldn't say one, come up with one. I
11 understand that you think your defenses apply differently in
12 the adversary proceeding than they may apply in the net
13 equity context, but the computation of new equity and
14 fictitious profits for fraudulent transfer purposes is
15 precisely the same.

16 MS. NEVILLE: That only relates to their claim
17 against me for fraudulent conveyance. It does not relate to
18 my defense, which is not -- which is based, as you know, on
19 unavoided obligations which are the --

20 THE COURT: But I can decide that as a matter of
21 law. I don't need a trial for that.

22 MS. NEVILLE: Well --

23 THE COURT: Do I? Hasn't all this been decided?

24 MS. NEVILLE: I see why I'm frustrated.

25 THE COURT: I understand you dispute it and at

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1 some point, probably Judge Rakoff's determinations of those
2 issues will go to the Second Circuit as the
3 extraterritoriality determination went up there. But I can
4 decide these issues as a matter of law. I have decided
5 these issues already.

6 MS. NEVILLE: You decided them in the context
7 where people acknowledged the Ponzi scheme presumption. And
8 the difference for me is that the reason you don't enforce a
9 contract in a Ponzi scheme is a public policy. But we're
10 arguing federal securities law which trumps this policy.

11 THE COURT: But that's the argument that Mr. Kirby
12 made on Section, what was it, 28 and 29 --

13 MS. NEVILLE: But he conceded it was a Ponzi
14 scheme. He conceded that, and I'm not conceding.

15 THE COURT: Well, they're arguing you did. Okay.

16 MS. NEVILLE: But let me just -- I would like to
17 finish because the gamesmanship argument is driving me nuts.
18 You made the invitation to me. I didn't really care.
19 Second of all, that jury trial demand --

20 THE COURT: Well, but that's in light of Judge
21 Daniels' decision in the Nelson and Sarah Lawrence cases
22 that as long as you have a pending claim that hasn't been
23 withdrawn, you're within the equitable jurisdiction of the
24 bankruptcy court --

25 MS. NEVILLE: Yes. And --

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1 THE COURT: -- or not entitled to a jury trial.

2 MS. NEVILLE: I think I laid out what I think
3 about that decision. It was based on absolute fraud on the
4 part of the Trustee.

5 THE COURT: What was the fraud on the part of the

6 --

7 MS. NEVILLE: The fraud was that he misquoted
8 Judge Rakoff, attributed to Judge Rakoff the two sides of
9 the coin issue, argued that he had a viable 502(d) claim,
10 which he does not, and also argued the dicta in that Stern
11 decision as the holding from Judge Rakoff, not the part
12 where Judge Rakoff said there's more to decide in the
13 adversary proceeding than just net equity. And that's what
14 the Stern decision says. And the trustee with five partners
15 signing off lied to Judge Daniels about what was going on.

16 MR. CREMONA: Your Honor, I'd like to address
17 that. I can't let that --

18 THE COURT: Well, why don't you raise that --

19 MR. CREMONA: I will refute that --

20 THE COURT: Hold up. Hold up. Why don't you
21 raise that before Judge Daniels before a disciplinary
22 committee.

23 MS. NEVILLE: Yeah.

24 MR. CREMONA: Your Honor?

25 MS. NEVILLE: Well, I raised it in my papers --

1 MR. CREMONA: Your Honor?

2 MS. NEVILLE: -- but I refuse to rely on that
3 Sarah Lawrence decision because when I read that, I was
4 appalled.

5 MR. CREMONA: Can I just --

6 THE COURT: You may refuse to rely on it.

7 MR. CREMONA: Can I correct a couple of quick
8 things, Your Honor?

9 THE COURT: Let her finish. Then I'll give you a
10 chance.

11 MR. CREMONA: Okay.

12 MS. NEVILLE: And let's talk about the
13 gamesmanship. The jury trial was in there from the get-go.
14 As I understand it, the law in this jurisdiction still is
15 that you go through all of the preliminary issues up to
16 trial before you move to the district court. That's the law
17 in this district. This is not gamesmanship.

18 THE COURT: Well, the practice. The --

19 MS. NEVILLE: The practice.

20 THE COURT: Right.

21 MS. NEVILLE: Whatever. The practice.

22 THE COURT: All right. Maybe -- you're suggesting
23 I put you -- I kind of blindsided you with that question
24 about whether you want to withdraw the claims. Do you want
25 to retract your withdrawal of the claim?

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1 MS. NEVILLE: It doesn't matter to me because what
2 I said was the claim was --

3 THE COURT: Just tell me. Just answer my
4 question.

5 MS. NEVILLE: I want to know that what I'm
6 withdrawing is what I say I'm withdrawing, which is exactly
7 only the claim, not the 500 presumptions that he wants to
8 lay onto the claim.

9 THE COURT: Well, that will be decided possibly in
10 the context of a motion for summary judgment. That's not
11 being decided today the effect of your withdrawal on the
12 factual -- on any factual issues that may exist. Look, I
13 didn't mean to blindside you. I thought I was moving this
14 process along, but if you --

15 MS. NEVILLE: Oh, I'm not --

16 THE COURT: -- if you want to retract it, just
17 tell me yes or no. Don't tell me conditions. Just tell me.

18 MS. NEVILLE: And I'm not General Flynn. I knew
19 what you were asking, and I went ahead and did it. But I do
20 think that --

21 THE COURT: Do you want to withdraw --

22 MS. NEVILLE: No.

23 THE COURT: Okay.

24 MS. NEVILLE: No.

25 THE COURT: Good.

1 MS. NEVILLE: I don't.

2 THE COURT: All right.

3 MS. NEVILLE: But I want to be able to say let's
4 not just read cases that have really sweet-sounding
5 decisions and have nothing to do with the facts of this
6 case. This proceeded for ten years at a billion dollars for
7 these guys on two completely separate tracks. And that's
8 absolutely true. There was no joinder of the adversary
9 proceeding to the claims allowance process. And Mr.
10 Cremona's analysis only goes to the fact that he will only
11 see things within the Ponzi scheme context, which is that
12 everything over your investment is fictitious profits and
13 we're entitled to it.

14 And that is not our defense. So I -- the
15 differences between this case and the cases that are cited,
16 first of all, Exodus or EXDS is not a Second Circuit case.

17 THE COURT: Exodus was a book and movie.

18 MS. NEVILLE: Pardon me.

19 THE COURT: Go ahead.

20 MS. NEVILLE: Isn't it that EXDS Communications is
21 the real name in that case?

22 THE COURT: You left out some bells I think.

23 MS. NEVILLE: It is not a Second Circuit case.

24 And the Second Circuit is really clear that the filing of a
25 claim does not -- is not the whole story.

1 THE COURT: I heard you.

2 MS. NEVILLE: So does this implicate the claims
3 allowance process? The adversary says no. We're not going
4 to do it. I think that's a screw-up on their part, but they
5 did it. They did not join the adversary to the claims
6 allowance process. So we went up to the Second Circuit. We
7 went up to the Supreme Court twice. Didn't get anywhere on
8 the Supreme Court, but we went there twice on a claims
9 allowance. And that said no net equity, no final statement,
10 and no adjustment to net equity. That ended my claim.

11 THE COURT: I disagree.

12 MS. NEVILLE: Once we knew that --

13 THE COURT: I disagree.

14 MS. NEVILLE: -- the calculation was right.

15 THE COURT: And we've been through this before,
16 but you are still pursuing the argument that they
17 miscalculated the deposits and withdrawals. So even under
18 the net equity decision, you still have a claim that you
19 (indiscernible).

20 MS. NEVILLE: You know, at that point --

21 THE COURT: You may not have prosecuted it or the
22 Trustee may not have made a motion of some sort, but you
23 still would have had a live claim.

24 MS. NEVILLE: The net equity said money inverse is
25 money out. Once he filed that chart, I had no way to

1 dispute it.

2 THE COURT: Yet you disputed it.

3 MS. NEVILLE: Now other ones I do dispute.

4 THE COURT: Because after he filed the
5 determination letter which had the same chart, you disputed
6 it. That's what discovery is for. You could have taken
7 discovery.

8 MS. NEVILLE: Right. If you want to say we still
9 have a live claim, that's fine. But the live claim is often
10 in another proceeding. It is not joined to this adversary
11 proceeding.

12 THE COURT: Okay.

13 MS. NEVILLE: And the fact that he wants to go
14 forward with the calculation of what he claims is the
15 fraudulent transfer is very different than the 548(c)
16 defense that I have.

17 THE COURT: Thank you.

18 MR. CREMONA: Can I, Your Honor, very quickly just
19 address some of those inaccuracies? Number one, the EXDS
20 case is entirely consistent with law of this circuit. We
21 talked about germane (phonetic) but the more apt case is In
22 re CBI EMY and that talks about the reasons why germane
23 didn't -- came out differently is because it didn't involve
24 a preference. It didn't involve --

25 THE COURT: It was the trustee who wanted the jury

1 trial in that? Yes.

2 MR. CREMONA: And it didn't have a fraudulent
3 transfer claim that invoked the claims allowance process in
4 the way that this does.

5 Secondly, Ms. Neville keeps bringing up the net
6 equity order. That order is quite clear that the balance of
7 her claims were not expunged or retained by this Court. Any
8 argument otherwise is belied by the fact that she litigated
9 here from 2010 until 2015. If the claim was resolved, as
10 Your Honor pointed out, she wouldn't have done any of that.

11 Next, she talks about Stern v. Marshall and our
12 misrepresentation to the district court. That is flat out
13 false. What we quoted to the district court was that
14 standing alone -- what she quotes is standing alone, a net
15 equity claim doesn't resolve the issues in an adversary.
16 What is here is not that. What is here is a net equity
17 claim, an objection, and ongoing litigation. So it's
18 entirely different.

19 THE COURT: So she -- her argument though is -- or
20 one of her arguments is that the adversary proceeding didn't
21 object to the claim. And I think you said at some point
22 that you were going to follow a different route with respect
23 to the claim.

24 MR. CREMONA: But, Your Honor, that's just merely
25 based on a simple fact. The bar date here for claims is

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1 statutory at six months. To bring an avoidance action, you
2 have under 546(a) two years. That didn't coincide at the
3 outset of the case. And once it did, we've clearly filed a
4 process all throughout, as Your Honor knows. You entered 23
5 orders resolving pending claims, and none of those, none
6 include adversary proceedings because they are now being
7 resolved collectively as a result of where we are. We
8 didn't know we were suing certain people when the bar date
9 occurred. That's the reason for that separation.

10 There is -- it's entirely consistent.

11 THE COURT: But you filed this adversary
12 proceeding after the bar date, right?

13 MR. CREMONA: That's true.

14 THE COURT: So why didn't you object to the claim
15 under 502(d) or in any other manner in the adversary
16 proceeding?

17 MR. CREMONA: But as we've talked about, Your
18 Honor, 502(d) operates as a matter of law. There was no
19 need to.

20 THE COURT: But you'd still have to make a claim
21 objection then.

22 MR. CREMONA: And we did.

23 THE COURT: When did you make an objection to her
24 claim?

25 MR. CREMONA: We -- the Trustee denied it. Then

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1 there was an objection filed, and we were waiting to
2 schedule it to resolve it as part of this adversary
3 proceeding --

4 THE COURT: All right.

5 MR. CREMONA: -- which is why I'm saying it's
6 entirely consistent.

7 THE COURT: All right.

8 MR. CREMONA: Two more quick points, Your Honor.

9 THE COURT: Yeah.

10 MR. CREMONA: Ms. Neville is talking about being
11 blindsided by your invitation to withdraw --

12 THE COURT: Well, I asked her if she wanted to
13 retract it.

14 MR. CREMONA: But --

15 THE COURT: She said no. So she's ratified it.

16 MR. CREMONA: But the point is she made a motion
17 -- she sought to withdraw all her claims. Prior to that, we
18 moved to strike it, and you granted it.

19 THE COURT: Yeah. She sought to withdraw her
20 objection.

21 MS. NEVILLE: No, I didn't.

22 MR. CREMONA: I mean, Your Honor, I think --

23 THE COURT: It's an unusual procedure, but, you
24 know, that's what it was.

25 MR. CREMONA: And just to put to rest -- I am

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1 sorry I have to do it -- on this two sides of the same coin
2 and the fact that she seems to say we misquoted Judge
3 Rakoff. I'd like to read to you Your Honor's Cohen decision
4 which is 2016 Westlaw 1695296. This is Your Honor's
5 language: "Net equity and fictitious profits are two sides
6 of the same coin, Antecedent Decision. 499 B.R. 420. In
7 both cases, the trustee net deposits against withdrawals.
8 Net losers have net equity claims against the customer
9 property estate, and net winners are subject to liability in
10 connection with the fraudulent transfer, again citing
11 Antecedent Debt."

12 Antecedent Debt by Judge Rakoff, he says in his
13 conclusion -- just bear with me on second because we keep
14 doing this and it's I think inappropriate. Judge Rakoff
15 says: "Furthermore, the Court finds that a straight netting
16 method subtracting total withdrawals from total deposits of
17 principal is the appropriate way to calculate not only net
18 equity but also the defendant's fraudulent transfer
19 liability."

20 Thank you, Your Honor.

21 MR. BELL: Your Honor, if I might? The Trustee
22 and Ms. Neville submitted orders to enact the withdrawal of
23 the claim and the objections.

24 THE COURT: Yeah. I want to hear this --

25 MR. BELL: I would request that you enter an order

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1 so that we could move forward along the path you've directed
2 today.

3 THE COURT: Here's what I'd like you to do. Make
4 a motion summary judgment. I'll deal with the equitable
5 jurisdiction question either before or in the context of
6 that motion. My inclination is to conclude I have -- I
7 continue to have equitable jurisdiction. Nobody's mentioned
8 it, but the general --

9 MS. NEVILLE: Your Honor?

10 THE COURT: Let me just finish, will you? The
11 general rule in federal jurisdiction is it's determined at
12 the time that the -- the proceeding is commenced and nothing
13 that occurs afterwards subtracts from it. I'm not
14 technically talking about subject matter jurisdiction
15 because I always have subject matter jurisdiction over this.
16 We're talking about an aspect, I guess, of subject matter
17 jurisdiction. But make your motion. You can make your
18 arguments about res judicata or collateral estoppel. And
19 you can respond.

20 I guess there's a stipulation of facts in this
21 case in the draft -- in the pretrial order that's been
22 signed by the parties.

23 MR. CREMONA: That's correct, Your Honor.

24 THE COURT: So I will -- you know, and I
25 understand what the factual question is and -- but for the

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1 collateral estoppel, res judicata argument, I'm not sure
2 that that factual question can be resolved on a motion for
3 summary judgment unless the allocution is sufficient to do
4 that. I don't know when your transfers occurred.

5 MR. CREMONA: All were after 1996.

6 THE COURT: Oh, all right.

7 MR. CREMONA: So it takes that out of the
8 equation.

9 THE COURT: Were there any inter-account
10 transfers?

11 MR. CREMONA: No.

12 THE COURT: All right.

13 MR. CREMONA: So, Your Honor, if I may, just as a
14 --

15 THE COURT: Well, it may be a very simple case
16 where, you know, I have the allocution, then you have to
17 come forward with evidence showing that there was no, you
18 know, Ponzi scheme.

19 MR. CREMONA: Just as a housekeeping
20 matter, as Mr. Bell pointed out, the withdrawal order
21 implicated both this motion and the motion that's pending
22 before the District Court. The District Court extended our
23 time to see whether an order was going to be entered, so I
24 would just submit, we submitted competing order but both
25 orders agree --

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1 THE COURT: Well, all the order is going to say is
2 that the matter -- the claim is withdrawn with prejudice but
3 without regard to the rights of the parties targets cross
4 jurisdiction or anything else.

5 MR. CREMONA: That --

6 THE COURT: With a determination of the effective
7 -- without determining the effect of that withdrawal on --

8 MR. CREMONA: I think that much we agreed upon and
9 --

10 THE COURT: Yeah.

11 MR. CREMONA: -- if Your Honor would enter an
12 order to that effect --

13 THE COURT: I will.

14 MR. CREMONA: -- give us the necessary clarity on
15 the --

16 THE COURT: Okay.

17 MR. CREMONA: -- papers.

18 THE COURT: Fair enough.

19 MS. NEVILLE: Your Honor, I just -- I'd like to
20 ask you to refer again to the pleading that I filed, because
21 I went to a great deal of --

22 THE COURT: I certainly will. But I'm not --
23 look, I told you what I'm going to do today. It's not
24 necessary to continue to argue.

25 MS. NEVILLE: Well, I want to just add one thing.

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1 First of all, when I went back to look at the pretrial
2 order, it is a mess. It's full of typos and errors, and we
3 really need to fix it. It was done to try to meet the
4 deadline that we had imposed --

5 THE COURT: Okay.

6 MS. NEVILLE: -- on ourselves, and it's a mess.
7 That's number one. Second, I'd like to point out that the
8 quote that Mr. Cremona just read is you citing Judge
9 Rakoff's decision in which the Trustee is arguing two sides
10 of the coin. That argument has been perpetuated through the
11 Trustee's argument, not through --

12 THE COURT: You know, I've already --

13 MS. NEVILLE: -- any decision.

14 THE COURT: I've already said -- first of all,
15 there's nothing that you can say that will convince me that
16 the computation -- just talking about the computation -- of
17 net equity is any different from fictitious profits. So
18 let's just stop. I've told you what I'm going to do. I
19 will enter the order today. It'll be a vanilla order that
20 would grant your motion to withdraw with prejudice without
21 determining the effect of that withdrawal on any of the
22 issues in the case.

23 MR. CREMONA: Can we --

24 THE COURT: That's all.

25 MR. CREMONA: Can we establish, Your Honor, a

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1 briefing schedule since we're all here? I'd like to --

2 THE COURT: Well, let's -- you can file it. If
3 you can arrange a briefing schedule, that's fine, but you
4 can file your motion. If you think that there are typos,
5 particularly in the stipulation of facts, that's -- the rest
6 of it doesn't really matter -- submit a list to Mr. Cremona.
7 If he agrees -- he can submit his own list, but if you can
8 agree on what the typos are, I can correct them or you can
9 submit a corrected stipulation of facts.

10 I don't want to get into a situation where you say
11 that stipulation doesn't count and let's start over. I have
12 a stipulation of facts and unless something comes to my
13 attention that indicates there's an error in there, that's
14 what I'm going to use. Okay?

15 MR. CREMONA: Thank you, Your Honor.

16 THE COURT: Thanks. I want to advise the District
17 Court what's going on here. I don't know if that will
18 affect what occurs.

19 MR. CREMONA: While we intended, Your Honor, to
20 file our response which is due on the 30th and now I think
21 with the order being entered, that clarifies where things
22 stand.

23 THE COURT: Why don't you submit -- because I have
24 a lot of these dueling orders, just submit a plain vanilla
25 order that says the motion -- the oral motion to withdraw

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1 the claim with prejudice is granted but nothing herein
2 constitutes a determination of any -- of the effect of that
3 withdrawal on any of the issues in the case.

4 MR. CREMONA: Absolutely, Your Honor.

5 THE COURT: Okay, so it's clear.

6 MR. CREMONA: We will do that in short order. And
7 the next matter, if Your Honor is so inclined, are the two
8 motions filed by Ms. Chaitman --

9 THE COURT: Okay.

10 MR. CREMONA: -- in the Saren-Lawrence cases.

11 THE COURT: Go ahead.

12 MS. CHAITMAN: Helen Davis Chaitman on behalf of
13 the Nelsons and Ms. Saren-Lawrence. Your Honor, I don't
14 know if what just occurred impacts your view of the trial
15 schedule for these cases, but we asked for an adjournment of
16 the trial dates based upon the amended initial disclosures
17 that the Trustee has served.

18 THE COURT: Okay. But his argument is that he
19 wasn't required to serve them in your case or your cases,
20 because he didn't intend to rely on those people or those
21 witnesses in your cases.

22 MS. CHAITMAN: It's -- that's not sufficient, Your
23 Honor, to satisfy just the most fundamental requirements of
24 due process of law because in responding to the -- in the
25 initial disclosures, the Trustee stated that these people

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1 did not have knowledge relevant to the issues that he now
2 claims they --

3 THE COURT: He said they did not have knowledge?

4 MS. CHAITMAN: He stated --

5 THE COURT: Do you have a copy of his initial
6 disclosures?

7 MS. CHAITMAN: Yes.

8 MR. HUNT: Would you like me to bring you a copy,
9 Your Honor? It's actually Exhibit A to our --

10 THE COURT: What exhibit is it? Which motion is
11 this, by letter? B?

12 MR. HUNT: This is the motion to stay our response
13 --

14 THE COURT: So where are your responses -- I mean,
15 your mandatory disclosures?

16 MR. HUNT: They're on Pages 2 and 3.

17 THE COURT: Of which exhibit?

18 MR. HUNT: Of Exhibit A, and then we also filed an
19 amended (indiscernible). It's essentially the same.

20 THE COURT: These are the amended initial
21 disclosures in another case. Where are the initial
22 disclosures in this case -- or these cases?

23 MR. HUNT: This is in the Saren-Lawrence case
24 which I think --

25 THE COURT: Looks like Romanette A. Is this --

1 MR. HUNT: Maybe she's referring to something
2 different.

3 MS. CHAITMAN: You know what, Judge, I can't find
4 it right this second.

5 THE COURT: Well, somebody's got to show me the
6 initial disclosures. It's one thing to say that they never
7 disclosed it. It's another thing to say that they made an
8 affirmative representation that these people did not have
9 knowledge of relevant facts, which may still be true.

10 MR. HUNT: Your Honor, if I can approach --

11 THE COURT: Yeah.

12 MR. HUNT: -- I'll just give you a copy.

13 THE COURT: Thanks.

14 MR. HUNT: (Indiscernible).

15 THE COURT: Where in these disclosures does it say
16 that the people that they've now disclosed have no
17 knowledge?

18 MS. CHAITMAN: You know what, Judge, I'm just
19 having trouble finding it.

20 THE COURT: I don't think it says that. It just -
21 - the identity -- Mr. Hunt gave me the initial disclosures.
22 Or these are the amended initial disclosures, in the Saren-
23 Lawrence matter.

24 MS. CHAITMAN: Isn't there a sentence there that -
25 - it named certain people and then it said that the Trustee

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1 was not going to rely upon them?

2 THE COURT: I don't see that.

3 MR. HUNT: It's --

4 THE COURT: Is that in the original? These are
5 the amended.

6 MR. HUNT: Paragraph 5, I believe, Your Honor.

7 THE COURT: Where are the originals?

8 MS. CHAITMAN: -- looking.

9 THE COURT: These are undated, anyway.

10 MS. CHAITMAN: Yeah, this is what it is. It's
11 Paragraph 5. Do you see that on Page 3?

12 THE COURT: No, I'm having trouble finding the --

13 MS. CHAITMAN: It says --

14 THE COURT: Oh, DiPascali -- where it says --

15 MS. CHAITMAN: Yeah, it says, "Frank DiPascali,
16 deceased, and Erin Reardon were employed by BLMIS and upon
17 information and belief performed managerial, administrative,
18 and/or supervisory work for BLMIS. Be advised that the
19 Trustee does not expect to rely on former BLMIS executives
20 or employees at trial."

21 THE COURT: Okay.

22 MS. CHAITMAN: Okay. So --

23 THE COURT: And he's not. He's going to try and
24 prove his case, I guess, through his forensic accountants.

25 MS. CHAITMAN: Here's the problem, Your Honor.

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1 Even though the case management order said that the
2 discovery ended on specific dates for the Saren-Lawrence and
3 Nelson cases, the orders of Magistrate Judge Moss and then,
4 as incorporated in your order you entered, said that all
5 decisions on discovery related to all of my clients and we
6 demanded information in our initial document demands and in
7 our later documents demands, which included the Saren-
8 Lawrence and Nelson cases, and the discovery that --

9 THE COURT: But what if you asked -- in other
10 words, are you saying -- putting aside the mandatory
11 disclosures, that you asked for the identity of witnesses
12 with some knowledge, or something like that, and they didn't
13 disclose what they're now disclosing in mandatory disclose -
14 - I just don't understand what the argument is.

15 MS. CHAITMAN: Sure. It's --

16 THE COURT: Because their argument is pretty
17 straightforward, Ms. Chaitman. They only have to disclose
18 who they're going to rely on and they've done that.

19 MS. CHAITMAN: They -- one of the things that
20 we've been fighting over for two-and-a-half years or maybe
21 even close to three years, is the trading records, the
22 third-party trading records. And that's now been submitted
23 to Magistrate Judge Moss.

24 THE COURT: But let me come back to the motion. I
25 thought your motion was you wanted to adjourn the trial and

1 take discovery based upon supplemental disclosure --
2 supplemental mandatory disclosures which had been filed in
3 other cases.

4 MS. CHAITMAN: Their amended initial disclosures.

5 THE COURT: Okay, but they never filed amended --
6 did they file amended initial disclosures in your cases that
7 identified different people?

8 MS. CHAITMAN: They didn't disclose -- they've now
9 disclosed millions of new documents that they had not
10 previously disclosed in their disclosures. Now --

11 THE COURT: In your case?

12 MS. CHAITMAN: Yes.

13 THE COURT: In these cases?

14 MS. CHAITMAN: They -- Judge, just let me step
15 back and say one thing. If you recall, they recently in the
16 spring filed a motion for a new omnibus proceeding where
17 they would take all of the depositions and discovery that
18 they now are indicating through the amended initial
19 disclosures. In that motion, even though all discovery was
20 ended in these cases, they sought to included these cases in
21 the new discovery.

22 THE COURT: Let me stop. Are you saying that in
23 your three -- in the three cases we're talking about or in
24 any on of the three cases --

25 MS. CHAITMAN: Yes.

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1 THE COURT: -- we're talking about, they disclosed
2 certain witnesses and documents and then after discovery was
3 closed in these three cases filed supplemental disclosures
4 where they identified new witness -- or new people they were
5 going to rely on or new documents they were going to rely
6 on?

7 MS. CHAITMAN: In all the other cases where --

8 THE COURT: Okay.

9 MS. CHAITMAN: -- the factual issues are
10 identical.

11 THE COURT: But they can't use -- if they need
12 those documents --

13 MS. CHAITMAN: But we need it. We need it. They
14 have never produced the trading records. They're now
15 talking about --

16 THE COURT: They're not going to use them, though.
17 That's what they're saying.

18 MS. CHAITMAN: But we need them, Your Honor.

19 THE COURT: But did you ever ask for them in this
20 --

21 MS. CHAITMAN: Of course I did.

22 THE COURT: Did you file discovery requests in
23 these adversary proceedings?

24 MS. CHAITMAN: I filed discovery requests in all
25 of my cases, Your Honor, and I requested that all of my

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1 clients be treated the same for all these discovery motions.
2 Instead of filing 75 or 80 discovery motions, I filed them
3 all in Wilenitz. The Wilenitz motions were before you, they
4 were before Magistrate Judge Moss.

5 THE COURT: Was discovery still open in these
6 three cases when you did that?

7 MS. CHAITMAN: The case management orders were --
8 show that discovery was over, but discovery was still
9 requested. We hadn't resolved the discovery that was asked
10 for.

11 THE COURT: But that was in other cases where
12 discovery was still open.

13 MS. CHAITMAN: No. It was in all of them, Judge.
14 That's why there are orders entered by Magistrate Judge Moss
15 and by you which say that any discovery rulings apply to all
16 of my clients. There was -- I didn't go through the process
17 and Magistrate Judge Moss agreed and you agreed --

18 THE COURT: I --

19 MS. CHAITMAN: -- that we wouldn't have to file
20 these in every single case.

21 THE COURT: I'm just having trouble following the
22 chronology and who's --

23 MS. CHAITMAN: It's laid out in my papers, Your
24 Honor.

25 THE COURT: -- whose benefits -- and who is the

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1 beneficiary of those rulings and whether or not it affects
2 these three cases.

3 MS. CHAITMAN: Okay. It's all laid out in my
4 papers, and I apologize I wasn't able to focus it, but it's
5 laid out concisely in my papers, Your Honor. So the bottom
6 line --

7 THE COURT: So you're saying the effect of Judge
8 Moss' orders and my orders were to reopen or maintain open
9 the discovery in these three cases?

10 MS. CHAITMAN: Exactly. For anything, it's
11 responsive to demands that we were making from inception of
12 these cases, and --

13 THE COURT: When did the discovery close in these
14 cases under the case management orders? It may be three
15 different days, I recognize.

16 MS. CHAITMAN: The -- it's laid out in my papers,
17 Your Honor. I don't have it committed to memory, but it's
18 all in here.

19 MR. HUNT: I know the answer to that.

20 MS. CHAITMAN: Again, these are --

21 THE COURT: Let her finish.

22 MS. CHAITMAN: You know, the factual issues, Your
23 Honor, are whether there was trading, whether this actually
24 was ever a Ponzi scheme, and whether the securities that
25 appeared on the customer statements, in fact, were owned by

1 Madoff at the time they appeared --

2 THE COURT: But you know --

3 MS. CHAITMAN: -- on the customer statements.

4 THE COURT: Look, I understand what the factual
5 issues are. I'm assuming, I don't know, but I'm assuming
6 that they're going to prove a Ponzi scheme through the
7 allocution and through Dubinsky's expert testimony. I know
8 you disagree with it for a lot of reasons, but that's what
9 they're going to do. They're not going to rely on trading
10 records or anything like that. That's my assumption.

11 So whether or not they disclose trading records as
12 part of mandatory disclosure, they probably don't have to do
13 that.

14 MS. CHAITMAN: But, Judge, I have a right to the
15 discovery. If I serve a document demand for the trading
16 records --

17 THE COURT: But that's what I'm asking you. Your
18 argument seems to be based on the notion, which may be
19 correct, I don't know, that somehow notwithstanding that
20 discovery was closed in these three cases, you still had to
21 produce -- had the right to these documents within the
22 context of these.

23 MS. CHAITMAN: Yes.

24 THE COURT: I understand that.

25 MS. CHAITMAN: And it begins on Page 5 of my brief

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1 and it goes on for several pages. We lay out every demand
2 and the status of every response, and Judge Moss' order --

3 THE COURT: I'm not interested in demands in other
4 cases, unless there's a determination that whatever you did
5 in the other cases applies to these cases. That's --

6 MS. CHAITMAN: There was an order entered by you
7 after a similar order was entered by Judge Moss. And there
8 was no client of mine that was excluded from that order.

9 THE COURT: All right. Let me hear from the
10 Trustee.

11 MR. HUNT: Good morning, Your Honor, Dean Hunt for
12 the Trustee. It's clear that the defendant's don't want to
13 go to trial in these cases.

14 THE COURT: Okay, but let's cut to the chase.
15 She's saying that notwithstanding the fact that discovery
16 was closed in these three cases, as a result of proceedings
17 in other Chaitman cases where discovery was not closed,
18 somehow these three proceedings got drawn into that open-
19 ended discover that's been going on with the trading
20 records. That's basically what she's saying.

21 MR. HUNT: I know. Yeah, discovery closed in
22 these cases in March of 2016.

23 THE COURT: Okay.

24 MR. HUNT: That was months ago. We took
25 discovery. The defendants did not take any discovery, no

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1 interrogatories, no request for production, no depositions.
2 They just sat on their hands. They made a tactical decision
3 not to participate in discovery. So now what they're ask
4 you to do is basically pretend that they served
5 interrogatories --

6 THE COURT: But Ms. Chaitman --

7 MR. HUNT: -- and they didn't.

8 THE COURT: --said that is the effect of the
9 proceedings before Judge Moss and me.

10 MR. HUNT: She's wrong.

11 THE COURT: Okay, tell me why she's wrong.

12 MR. HUNT: Because these cases were excluded from
13 those proceedings.

14 THE COURT: Okay. Is that documented?

15 MR. HUNT: Yes.

16 THE COURT: Where is that documented?

17 MR. HUNT: In the orders from Judge Moss.

18 THE COURT: Are they part of this packet that
19 you've given me?

20 MR. HUNT: Well, certainly the transcript from the
21 last hearing with Judge Moss --

22 THE COURT: Well --

23 MR. HUNT: -- last it is, where she clearly
24 conceded that these cases are trial-ready cases. So, yeah,
25 that's in there.

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1 THE COURT: Is there anything else which would
2 bear on this issue?

3 MR. HUNT: There's nothing that says that they
4 aren't excluded and discovery's been closed. We've been
5 ready for trial. She's gone up asking for a jury trial.
6 Now she's making another argument in order to cause further
7 delay.

8 THE COURT: Okay.

9 MR. HUNT: That's clearly what's happening here.

10 THE COURT: All right. All right, look, I'm going
11 to have to -- yes. I'm going to have to review.

12 MS. CHAITMAN: I can say it. We served document
13 demands. We --

14 THE COURT: In this -- in these three cases?

15 MS. CHAITMAN: Yes. We served interrogatories --
16 it's all laid out in my brief, Your Honor --

17 THE COURT: You're telling me they never took
18 discovery --

19 MS. CHAITMAN: -- starting on Page 5.

20 THE COURT: -- in these cases?

21 MR. HUNT: They didn't. After discovery was
22 closed and they tried to --

23 THE COURT: Oh.

24 MR. HUNT: -- and we objected.

25 THE COURT: Prior to the discovery deadline, did

1 you take any discovery in these three cases, Ms. Chaitman?

2 MS. CHAITMAN: It was done in the Wilenitz case
3 and that --

4 THE COURT: When was that?

5 MS. CHAITMAN: It's all laid out in here, Your
6 Honor, and --

7 THE COURT: Can't you just tell me a date?

8 MS. CHAITMAN: Okay. We served interrogatories on
9 March 8th, 2016 and June 21st --

10 THE COURT: But that was a couple of days before
11 the end of the termination of discovery in these cases.

12 MS. CHAITMAN: And June -- right. And then --

13 THE COURT: You can't -- I mean, if discovery is
14 going to be cut off 10 days later, you can't serve
15 interrogatories which they don't have to answer for 30 days.

16 MS. CHAITMAN: They answered them. They answered
17 them, and Your Honor --

18 THE COURT: In these cases?

19 MS. CHAITMAN: Yes. And then -- it's all laid out
20 here on the --

21 THE COURT: Your Honor, why don't you give me all
22 the discovery requests because I know they don't necessarily
23 get filed. Give me your discovery requests in these three
24 cases and the responses.

25 MS. CHAITMAN: Okay.

1 THE COURT: Because I just don't have these
2 documents.

3 MS. CHAITMAN: You know what, Judge, they're all
4 next to my declaration.

5 THE COURT: All right.

6 MS. CHAITMAN: They're all --

7 THE COURT: So everything I need to know on your
8 motion is next to your declaration?

9 MS. CHAITMAN: You know what, I will review it and
10 if there's anything that's missing, I will send it in.

11 MR. HUNT: Your Honor, I think you've got it
12 exactly right, though. I mean, Rule 26(a) requires us to do
13 what we did.

14 THE COURT: Yeah, I mean, if that's all that the
15 motion is based on and all this other stuff is extraneous,
16 it's not going to affect the disposition of the motion.

17 MR. HUNT: Yeah, I agree with that completely.

18 THE COURT: All right. Let's assume the trials
19 are going forward. Let's go to the next issue which is, I
20 guess, Ms. Nelson and Mr. Nelson.

21 MS. CHAITMAN: Okay, so the what I'm suggesting if
22 Your Honor is going to try these cases at all -- and I don't
23 think --

24 THE COURT: Well, let's assume that I am.

25 MS. CHAITMAN: Okay.

1 THE COURT: Let's talk about scheduling.

2 MS. CHAITMAN: Okay. What I would suggest is,
3 there are two facets to these cases. One is the deposits
4 and withdrawals and that may or may not be contested. And
5 the other which is a much more complicated part of the trial
6 is common to all three cases, and that is the factual issues
7 as to whether this was ever a Ponzi scheme, whether 703
8 account money was used to purchase customer securities,
9 whether those securities appeared on customer statements, et
10 cetera.

11 All of those issues which are very complex and
12 involve a great many witnesses, those issues are common in
13 all these cases. And what I was suggesting to you is that
14 we put off the trial until June and we have -- if you want
15 to go forward that we have a consolidated trial of all of
16 those issues and we simply deal with the deposits and
17 withdrawals separately.

18 THE COURT: Why don't we move everything up to
19 February on the common issues?

20 MS. CHAITMAN: We can't do that because the reason
21 we scheduled the Nelsons for May is that Ms. Nelson is going
22 in for knee surgery in late January and she will not be --

23 THE COURT: Okay.

24 MS. CHAITMAN: She's going to be incapacitated.

25 And I've got a health issue with Ms. Saren-Lawrence because

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1 she has a brain aneurysm and I'm in communication with her
2 doctor as to whether she could withstand the stress of a
3 trial. I have to figure that out.

4 THE COURT: Okay.

5 MS. CHAITMAN: So that's why I'm suggesting if we
6 put this off, Ms. Saren-Lawrence had one brain aneurysm
7 which was operated on; that was okay. If we have the second
8 one operated on, she would be able to --

9 THE COURT: Okay. Putting aside the question of
10 specific deposits and withdrawals, it sounds like you agree
11 that basically the other issues, the other factual issues
12 are the same, which is whether there was a Ponzi scheme.

13 MS. CHAITMAN: Yes. No, there are differences --
14 if I take Helene Saren-Lawrence and I go through every
15 statement that she received and I prove that, in fact,
16 Madoff or BLMIS was holding the securities that appeared on
17 her statement, that evidence is going to be different from -
18 -

19 THE COURT: I understand.

20 MS. CHAITMAN: -- the evidence with respect to
21 each of the Nelsons' accounts. But it's going to be the
22 same concept that we'll be able to show that the securities
23 on the statements were actually in Madoff's or BLMIS'
24 possession at the time.

25 THE COURT: Okay, but that -- all right. But

1 whether or not Madoff was conducting a Ponzi scheme, which
2 may be an overarching issue such that -- and I think Judge
3 Dearie recently entered a decision in the Eastern District
4 that even if you have a few legitimate trades within the
5 context of a Ponzi scheme it doesn't change the fact that it
6 was a Ponzi scheme.

7 All right, so you're proposing that we try the
8 common issue of Ponzi scheme later in 2019 with all three
9 together. That's what you're --

10 MS. CHAITMAN: Well, it's not just Ponzi scheme.
11 There are other issues.

12 THE COURT: But what are the other common issues,
13 though? I mean, we know their witnesses are going to be the
14 same three experts.

15 MS. CHAITMAN: Whether -- well, okay. On the IRA
16 account, there are factual issues for Ms. Nelson as to
17 whether -- because we think she's a subsequent transferee
18 who took her value without knowledge --

19 THE COURT: But -- whether or not she's a
20 subsequent transferee or an initial transferee is a question
21 of law, really.

22 MS. CHAITMAN: Well, there -- I think it's a
23 combined question of law and fact because it will depend
24 upon how long the IRA custodian held the funds, whether the
25 IRA custodian took certain monies out, whether the IRA

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1 custodian paid the taxes. There were a bunch of issues as
2 to the IRA account which are factual. I'm not saying it's a
3 three-week trial, but there are separate factual issues on
4 that.

5 But then with respect to what I call the common
6 defenses, it's not simply whether it's a Ponzi scheme. It's
7 whether the securities -- and I'm not familiar with the
8 decision to which you're referring, but I think we'll be
9 able to show you that a great many of the securities that
10 appeared on customer statements were actually owned by
11 Madoff or BLMIS.

12 THE COURT: Okay, but that's part of the deposits
13 and withdrawals issue which is particular to each -- all
14 right, let me -- the proposal, as I understand it, correct
15 me if I'm wrong, is the issue of whether or not there was a
16 Ponzi scheme, is a common issue which should be tried
17 together but it should be tried later on in the year.

18 MS. CHAITMAN: And the other issue is the 509
19 account because all of the checks -- all of the transfers to
20 both Saren-Lawrence and the Nelsons were made by check from
21 an account in the name of Bernard L. Madoff and the Trustee
22 has conceded that he has no document with JP Morgan Chase
23 changing the name of the 509 account from Bernard L. Madoff
24 to BLMIS, LLC.

25 THE COURT: Okay, but that's the same issue.

1 Whether it's factual or legal, that's the same issue in all
2 three, right?

3 MS. CHAITMAN: Correct.

4 THE COURT: Okay.

5 MS. CHAITMAN: I was supplementing.

6 THE COURT: All right.

7 MR. HUNT: I'm not sure what we're arguing about
8 here.

9 THE COURT: Well, we -- it sounds like Ms.
10 Chaitman agrees that there are at least certain issues which
11 should be tried as one. In other words, common issues. You
12 have the same witnesses, presumably, in your direct case:
13 whether or not there's a Ponzi scheme, whether or not the
14 right plaintiff has brought this action, maybe it should be
15 the Trustee of Mr. Madoff's individual estate who should've
16 brought it.

17 But that's a common -- that's kind of a common
18 question that pervades all three. But what she's saying is
19 Ms. Saren-Lawrence may not able to go forward anyway in
20 February, but we don't have any medical evidence of that and
21 I guess she's proposing that all of the three cases on those
22 issues be tried together at some point, I guess, in May or
23 June. That's what she's proposing.

24 MR. HUNT: Yeah, I think that the Saren-Lawrence
25 case is different.

1 THE COURT: Tell me --

2 MR. HUNT: The account was opened at a different
3 time. It was opened earlier in December of '92. These
4 other cases, other accounts were opened later.

5 THE COURT: But how does that make the case
6 different?

7 MR. HUNT: Well, it doesn't--

8 THE COURT: (Indiscernible).

9 MR. HUNT: -- will in her mind, I believe, in
10 terms of whether it was a Ponzi scheme. I don't want to get
11 caught into this situation, I'm going to argue --

12 THE COURT: But it's the same issue, isn't?

13 MS. CHAITMAN: It won't in my mind because all the
14 accounts were opened in 1992.

15 THE COURT: It's the same issue, though, isn't it?

16 MR. HUNT: Yeah, I mean --

17 THE COURT: Unless you're saying there wasn't a
18 Ponzi scheme in 1992, but starting January 1st, 1993 it was
19 a Ponzi scheme, which I don't understand the Trustee's
20 theory to be, frankly.

21 MR. HUNT: I do think, though, that there are
22 common parties in the Nelson case.

23 THE COURT: Oh, yeah. There are certainly common
24 parties, but there are common issues in all three and there
25 are common witnesses in all three, so I'm just --

1 MR. HUNT: We're right back to sort of a mini --

2 THE COURT: So that --

3 MR. HUNT: -- omnibus proceeding.

4 THE COURT: Well, you know, but we got into that
5 because some people insisted they were entitled to jury
6 trials and never filed claims, I guess, and that's where
7 that one went off stray, but if we can try three cases
8 together, that's still better than trying them separately.

9 But it's really a question of timing. I scheduled
10 the Saren-Lawrence trial, I think, in February. Right now,
11 that's what the schedule is. I have no medical evidence
12 that she can't go forward. I'll hear it if it comes to be.
13 Question is whether you just want to try all three together
14 later in the year.

15 MR. HUNT: I think if we try all three together, I
16 guess it makes sense to do that but I don't think it makes
17 sense to do it later in the year because --

18 THE COURT: Well, I can't really --

19 MR. HUNT: -- now they get another seven months'
20 delay and we know that's --

21 THE COURT: But what do you propose? Ms. Nelson
22 is having knee surgery, I'm told. It's going to take a
23 while for her to recover. She's an elderly person.

24 MR. HUNT: Right, which means that we can try
25 everything in Nelson cases in May, which is already

1 scheduled.

2 THE COURT: Do you want to move the Saren-Lawrence
3 matter to May, also?

4 MR. HUNT: No, I'd rather do that in February?

5 THE COURT: All right, well, that's what I'm
6 asking.

7 MR. HUNT: (Indiscernible).

8 THE COURT: Okay. Look, I had scheduled the
9 Saren-Lawrence matter for February --

10 MS. CHAITMAN: yes.

11 THE COURT: For the time being, it's going forward
12 in February. If she's medically unable to go forward, it's
13 going to require more than your say-so, obviously.

14 MS. CHAITMAN: No, no, no. I'm going -- I've
15 communicated with the doctor. I wanted to get the letter in
16 a more timely manner because --

17 THE COURT: All right, we'll see. Because that's
18 off -- we're talking about a trial that's two months off at
19 this point.

20 MS. CHAITMAN: Yeah, but she has a brain aneurysm
21 and unless something --

22 THE COURT: Well, I would certainly listen to
23 whatever the doctor has to say --

24 MS. CHAITMAN: Yeah --

25 THE COURT: -- but right now, I'll stick with the

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1 schedule. In terms of trying the Nelson cases together,
2 I'll do that. Certainly on the common issues; although, I
3 can probably do it on all of the issues. There's nothing
4 I've heard about those two cases, notwithstanding an IRA's
5 involved in one case, I can just hear it all together. You
6 know, the deposits and withdrawals don't sound like they're
7 going to take a long time to try.

8 The issue of whether there's a Ponzi scheme is a
9 more difficult issue, or may be a more difficult issue. So
10 I'd be inclined to try the Nelsons together in May if that's
11 the date that we used. Did we pick a specific date for one
12 of them?

13 MR. HUNT: We picked May 8.

14 THE COURT: All right. Well, why don't we
15 schedule both of those trials for May 8, and we go forward
16 subject to contrary medical evidence, with Saren-Lawrence.
17 What was it, February 19th?

18 MR. HUNT: I think that's right, Your Honor.

19 THE COURT: All right.

20 MS. CHAITMAN: Okay.

21 THE COURT: All right, why don't you submit an
22 order to that effect so we remember what occurred.

23 MR. HUNT: Okay.

24 THE COURT: And I'll review the documents on the
25 issue of discovery. I'm hearing two -- I'm hearing

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1 different stuff.

2 MS. CHAITMAN: Yeah.

3 THE COURT: All right. Thank you.

4 MS. CHAITMAN: Okay.

5 MR. HUNT: Thank you, Your Honor.

6 THE COURT: Okay, next.

7 MR. CALVANI: Good morning, Your Honor. Next on
8 the agenda is a motion to quash a subpoena issued by the
9 Shapiro defendants.

10 THE COURT: All right.

11 MS. WHITE: Good morning, Your Honor. Mary Grace
12 White of LaxNeville for defendants. In September, the
13 Trustee issued a subpoena to JP Morgan Chase Bank seeking
14 the entire loan file dating back to 1995 and all
15 communications relating to that loan file.

16 THE COURT: Was this a home equity line of credit
17 that we're talking about?

18 MS. WHITE: I believe it was.

19 THE COURT: Because I can't imagine a co-op would
20 agree to a pledge of the shares in the proprietary lease of
21 some other type of loan. Do you know the answer to that?
22 Have you seen the loan documents?

23 MS. WHITE: I believe it is.

24 MR. CALVANI: (Indiscernible) residential.

25 THE COURT: All right. It was a home equity line

1 of credit?

2 MR. CALVANI: Yes, Your Honor.

3 THE COURT: Okay. Go ahead. Thank you.

4 MS. WHITE: And the -- and JP Morgan Bank,
5 obviously, objected citing (indiscernible).

6 THE COURT: Okay, but they're okay with it. They
7 found the loan file, so now it's your -- you represent the
8 Shapiros, right?

9 MS. WHITE: Correct.

10 THE COURT: All right.

11 MS. WHITE: The Shapiros, obviously first, have
12 standing for this motion to quash the subpoenas
13 (indiscernible) personal financial information. It's well
14 established that third parties, particularly individuals
15 whose personal, private financial information is sought have
16 standing to move to quash subpoenas.

17 THE COURT: But you'd use that basis if you're
18 standing to object not just to disclosure of private
19 information but to argue that the request is irrelevant, and
20 one of my questions is whether you have the standing to
21 argue that the request is irrelevant, assuming that there
22 are no personal privacy issues involved.

23 MS. WHITE: Well, so, the issue of relevance is
24 essential to the evaluation of the privacy interest itself

25 THE COURT: Right.

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1 MS. WHITE: Once privacy interest, unless standing
2 is established, the Courts then turn to see if there is any
3 relevance involved. It's obviously the Trustee's burden to
4 establish that relevance and they simply have not. They
5 sought to link the documents contained in this loan file to
6 an alleged back-dated trade by ascribing motivations and
7 communications to both Mr. Shapiro and Ms. Bongiorno that
8 simply aren't in the record.

9 There's nothing -- excuse me, I have a cold.
10 There's nothing in evidence to indicate, first, that any of
11 the documents contained in this loan file would indicate
12 that backdated trades were --

13 THE COURT: Well, we don't know until we look at
14 the documents, though. That's -- isn't that a chicken and
15 egg problem?

16 MS. WHITE: It's -- I believe it's the Trustee's
17 chicken and egg problem, though, because they have to say --
18 they have to establish that the documents they seek are
19 relevant. They have to establish that they're linked to
20 allegations in the underlying case. They have to provide
21 some basis rather than a narrative they put together for
22 seeking these documents, and there's nothing in the
23 narrative they put together that suggest that this file has
24 any documents related to backdating of trades, any documents
25 that would show Mr. Shapiro knew that there were backdated

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1 trades, or any evidence that Mr. Shapiro knew that these
2 backdated trades meant that this was a Ponzi scheme.

3 And those are the allegations at issue here. Even
4 if there were, though, some relevance of these documents,
5 Mr. Shapiro's privacy interest clearly outweighs that
6 relevance.

7 THE COURT: So what's the privacy interest that's
8 being implicated here? We know he owned the apartment.

9 MS. WHITE: Right.

10 THE COURT: And we know, you know, the proprietary
11 lease and the share certificates are not confidential or
12 private. What's the private information that you're worried
13 about?

14 MS. WHITE: Your Honor, I have not seen the file,
15 but our understanding is that the documents that would go
16 into any mortgage loan would involve the way that the loan
17 was paid back, evidence of --

18 THE COURT: Why is that confidential?

19 MS. WHITE: It's not confidential --

20 THE COURT: Well, what's the privacy issue?
21 That's what I'm trying to get at. Yes, it's about the
22 Shapiros and it's about them receiving and paying loans,
23 presumably, but what privacy interest does that implicate?

24 MS. WHITE: Inasmuch as -- excuse me. Inasmuch as
25 these documents are bank documents that contain their

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1 financial information, they have a privacy interest in their

2 --

3 THE COURT: Okay.

4 MS. WHITE: -- personal financial information.

5 THE COURT: What about documents that relate to --

6 by the bank, within the bank -- say emails if they had

7 emails then, I don't know -- regarding a discussion of the

8 collateral or the assets that are depicted on a financial

9 statement that you normally submit, like an email that says,

10 we see this account with BLMIS, it's valued at \$8 million,

11 we don't see how that could be the case, or something like

12 that.

13 MS. WHITE: Well --

14 THE COURT: Or everybody knows Madoff is a Ponzi
15 scheme operator.

16 MS. WHITE: And I think JP Morgan Bank -- who I
17 think was Chemical Bank at the time -- might have a bigger
18 problem on their hands.

19 THE COURT: Well, maybe.

20 MS. WHITE: But the fact is, that's not what the
21 Trustee asked for. The Trustee asked for the entirety of
22 the loan file, asked for the entirety of the communication.

23 THE COURT: So what do you think he's entitled to
24 in that loan file?

25 MS. WHITE: Well, I think that the only thing that

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1 he is entitled to, he already has. He has the letter from
2 Annette Bongiorno that states that as of the end of June
3 1995, there was in excess of \$8 million in the account, and
4 frankly, if you look at the statements he submitted, the
5 balance listed is in excess of --

6 THE COURT: Right.

7 MS. WHITE: -- \$8 million. So it's, I think, a
8 little hard for us to imagine how that could indicate to
9 Chemical Bank or to Mr. Shapiro anything that could be
10 remotely approaching knowledge of backdating or a Ponzi
11 scheme because on the face of it --

12 THE COURT: Well, that goes to the merits of the
13 case. The question is, what's in that bank file that might
14 bear on -- that might be relevant to one of the claims or
15 defenses.

16 MS. WHITE: The only thing that we could possibly
17 think of is this letter itself. There's nothing to indicate
18 that there were any communications between Chemical Bank and
19 BLMIS. There's nothing to indicate that Annette Bongiorno
20 ever followed up or had further conversations. The accounts
21 at BLMIS were not collateral for this loan.

22 THE COURT: So why wouldn't the Trustee be
23 entitled to any communications between the bank and BLMIS
24 relating to the Shapiro account?

25 MS. WHITE: They are not entitled to receive any

1 of that pursuant to this subpoena. The only thing --

2 THE COURT: Why not, if it's part of the loan
3 file?

4 MS. WHITE: I'm sorry?

5 THE COURT: What if it's part of the loan file?

6 MS. WHITE: Well, we maintain that they're not
7 entitled to the loan file.

8 THE COURT: No matter what's in there? So if
9 Shapiro writes a letter that says, look, I know this BLMIS
10 account is all fictitious but I have other assets that will
11 secure the loan. That wouldn't be relevant?

12 MS. WHITE: Your Honor, that would be relevant,
13 but it's their burden to establish that such a document
14 exists and it's in that file prior -- they can't embark on a
15 fishing --

16 THE COURT: That's different. That I understand,
17 but to say that they have to tell you everything that's in
18 the file before they get to look at it doesn't seem to make
19 a lot of sense.

20 MS. WHITE: No, let me be clear. They don't need
21 to tell us everything that's in the file to be able to look
22 at it. They need to have some basis for thinking that there
23 are relative documents, maybe not even as extreme as that
24 example, in this file rather than getting to go and look
25 back into the early '90s at Mr. and Mrs. Shapiro's finances

1 when there's nothing to suggest that these particular
2 financial documents or what would be in this loan file bear
3 any relevance, any material impact on what they're alleging.

4 THE COURT: All right. Let me hear from the
5 Trustee. Thank you.

6 MS. WHITE: Thank you.

7 MR. CALVANI: Good morning, Your Honor.

8 THE COURT: Good morning.

9 MR. CALVANI: Torello Calvani from BakerHostetler
10 on behalf of the Trustee. With me is my colleague, Nick
11 Rose. I'll start with the issue of relevance. I would like
12 to set forth the foundation for why we sought this -- why we
13 issued this subpoena to JP Morgan.

14 In the summer of 1995, Mr. Shapiro sought a loan.
15 To help this loan, Annette Bongiorno asked -- Mr. Shapiro
16 asked Annette Bongiorno to make certain representations to
17 JP Morgan about the value of his accounts.

18 THE COURT: I assume the bank wanted confirmation.

19 MR. CALVANI: Exactly.

20 THE COURT: Right.

21 MR. CALVANI: And we believe Mr. Shapiro also made
22 similar representations to JP Morgan about the value of his
23 account in order to establish his creditworthiness.

24 THE COURT: Right.

25 MR. CALVANI: The letter from Ms. Bongiorno says

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1 she is seeking to confirm the amount, implying that there's
2 a prior communication from --

3 THE COURT: Well, he probably filled out a
4 financial statement.

5 MR. CALVANI: Exactly, because it's a loan for
6 him. So we further believe that the statements Mr. Shapiro
7 made to JP Morgan were not only false, but are relevant to
8 his knowledge of fraud at BLMIS and specifically the
9 backdating of trades in his account.

10 THE COURT: I just didn't get that from your
11 papers, you know?

12 MR. CALVANI: The documents are confusing and if I
13 could --

14 THE COURT: It's not confusing because outside of
15 the loan with the bank, he's got that little note that says
16 that as of December 31st, 1995, my account should be worth
17 \$9 million, and coincidentally, it's worth \$9 million at the
18 end of the year. I understand that. What does the bank
19 file have to do with that?

20 MR. CALVANI: So Ms. Bongiorno sent the letter to
21 JP Morgan in July of 1995.

22 THE COURT: Right, confirming the value of the
23 account.

24 MR. CALVANI: Confirming the account.

25 THE COURT: Because he's applying for a loan and

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1 he fills out a financial statement and one of the things
2 that was probably on the financial statement was his BLMIS
3 account.

4 MR. CALVANI: Right, but we would like to know
5 what Mr. Shapiro represented to the bank on that account,
6 because he knew at the time that his accounts were not
7 valued at \$8 million.

8 THE COURT: So you want to see documents relating
9 to what Mr. Shapiro valued his BLMIS account at?

10 MR. CALVANI: We want to see what he represented
11 to the bank as to his value, as to his net worth, as to his
12 account, because the account statements for his single
13 account as of June 1995, these account statements he
14 produced to us were valued at \$6 million. So --

15 THE COURT: I saw the account statements, so it
16 says \$8.2 million, I think.

17 MR. CALVANI: It's really confusing. If you would
18 turn to Exhibit 4 of my declaration, this is the note --

19 THE COURT: Right.

20 MR. CALVANI: -- 8/31. It's on Madoff letterhead.
21 You see at the top it says S&R. That stands for S&R
22 Investment Company. And then you see two columns, one long,
23 one short. The statements for the long represent SH14-7.
24 The value in that account that you just referenced is \$11
25 million -- \$11.831 -- but you have to subtract the margin on

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1 the account which is debited there. That's 8.4.

2 THE COURT: But this was written by Shapiro?

3 MR. CALVANI: This was written by Mr. Shapiro on
4 August 31st. then you look at the -7 account next to that,
5 there you see the value at \$4.2 million, but because that's
6 a short account you have to look at the cost of covering the
7 short. That's \$1.8 million.

8 THE COURT: All right --

9 MR. CALVANI: Now you're --

10 THE COURT: I got it. You want to see what
11 representations he made to the bank regarding the value of
12 his BLMIS account. What else?

13 MR. CALVANI: Right, so we have what --

14 THE COURT: I didn't understand your argument that
15 he was originally going to pledge his BLMIS account.

16 MR. CALVANI: Yeah, I don't know why he didn't
17 pledge his BLMIS account.

18 THE COURT: This is a home equity line of credit.

19 MR. CALVANI: Yeah, I don't --

20 THE COURT: You don't get any tax advantage out of
21 getting a loan and pledging a BLMIS account.

22 MR. CALVANI: You're right, Your Honor. But then
23 we know that thereafter, he created -- or Annette Bongiorno
24 in September 1995 created a new account that Mr. Shapiro
25 didn't know he had.

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1 THE COURT: But what does that have to do with the
2 bank documents?

3 MR. CALVANI: I would like to know if he provided
4 those account statements or any account statements to JP
5 Morgan. We know that his son --

6 THE COURT: But that's not what you're asking for.
7 You're asking for the entire loan file.

8 MR. CALVANI: Right, and --

9 THE COURT: And there's a lot of -- she's right,
10 there's a lot of financial stuff in there that seems totally
11 irrelevant to the case and he doesn't want people to see it.

12 MR. CALVANI: Well, it's hard to know, again,
13 without seeing --

14 THE COURT: Not if you ask --

15 MR. CALVANI: -- the loan file.

16 THE COURT: Not if you ask by category. You know
17 what categories of information you want.

18 MR. CALVANI: Well --

19 THE COURT: You've told me you want to see any
20 representations regarding the value of his BLMIS accounts,
21 right?

22 MR. CALVANI: Right.

23 THE COURT: What else?

24 MR. CALVANI: And we would like to see if he
25 provided any account statements to JP Morgan.

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1 THE COURT: But that's part of the representation.

2 MR. CALVANI: Right. Because -- and what those
3 account statements are. And so we think that the simplest
4 way to go about that is to request the loan file. JP Morgan
5 has located the loan file and they're willing to produce it.

6 So --

7 THE COURT: But what about the personal -- the
8 private stuff that's in there that's irrelevant to the case?

9 MR. CALVANI: Okay.

10 THE COURT: How do you propose to deal with that?

11 MR. CALVANI: With a protective order, Your Honor.
12 This Court entered a protective order on June 6th, 2011.
13 Protective order safeguards their confidential information.

14 THE COURT: But don't you first have to establish
15 relevancy before you are even talking about a protective
16 order?

17 MR. CALVANI: Yes, Your Honor. Relevancy is our
18 burden to show.

19 THE COURT: Right.

20 MR. CALVANI: And we believe that we've met that
21 burden by showing how Mr. Shapiro participated in a
22 fraudulent scheme to defraud his bank through the backdating
23 of trades and we would like to know --

24 THE COURT: Well --

25 MR. CALVANI: -- if those trades or if those

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1 statements are in his loan file.

2 THE COURT: Okay --

3 MR. CALVANI: Now, the privacy interest that
4 they've raised, is their burden to show. It's our burden to
5 show relevancy; it's their burden on the motion to quash,
6 since they're seeking to stop discovery, to meet that
7 burden. All they've said is the magic words, privacy
8 interests. But they haven't really showed how that privacy
9 interest is affected here, how the disclosure --

10 THE COURT: Well, the disclosure to you of this
11 financial information, his assets and liabilities. I know
12 it's 25 years ago, but -- whatever it is. It's 24 years
13 ago. But, you know, that's private information, generally.
14 Private financial information.

15 MR. CALVANI: But, so they say they have a privacy
16 interest in that --

17 THE COURT: Right.

18 MR. CALVANI: -- and that outweighs relevancy, but
19 I don't think they've established harm of how they would be
20 harmed from the disclosure of that loan file.

21 THE COURT: Do they have to establish harm?

22 MR. CALVANI: I believe they do. United States
23 Region Economic Development Authority v. Matthews is a case
24 cited in our brief on Page 9.

25 THE COURT: How about the disclosure of private

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1 financial information. Is that harm?

2 MR. CALVANI: It's -- in that case, the Court
3 found that the defendants have not articulated a legitimate
4 privacy interest in preventing the release of those
5 documents other than a conclusory allegation that such an
6 interest exists.

7 THE COURT: What was the nature of the information
8 in that case?

9 MR. CALVANI: I believe it was tax returns. And
10 in this case, the cat's already out of the bag. We have Mr.
11 Shapiro's personal financial information. We have 10 years
12 of his tax returns. He consented to the production by
13 (indiscernible) of his tax returns. We reference these tax
14 returns in our complaint.

15 It's hard to say what information is out there
16 about his personal financial information we don't have, but
17 we don't want that, either. We're not seeking to collect on
18 a judgment here. We're seeking to find evidence of Mr.
19 Shapiro's knowledge of backdated trades.

20 THE COURT: Yeah, it just seems like this bank
21 file is very attenuated to that particular matter.

22 MR. CALVANI: Well, it's hard to say without
23 seeking the loan file, but this is a pattern that we've
24 noticed at BLMIS where his officemate, David Krugel, for
25 example, pleaded guilty to bank fraud under a similar

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1 scheme. They backdate trades in an account to establish
2 their creditworthiness on a loan they're not entitled to.

3 THE COURT: That's what -- Mr. Krugel said that
4 Mr. Shapiro did that?

5 MR. CALVANI: No, Mr. Krugel said he did it.

6 THE COURT: So because he did it, Mr. Shapiro did
7 it?

8 MR. CALVANI: Well, it's --

9 THE COURT: Is that the way you're going to prove
10 your case?

11 MR. CALVANI: Well, there -- his colleague, Jodi
12 Crupi, also did it. And so --

13 THE COURT: Oh, now we have two people who did it.

14 MR. CALVANI: It seems like --

15 THE COURT: Sounds like a pattern in practice.

16 MR. CALVANI: Well, it seems like a perk that one
17 might get as an employee of BLMIS, that they're willing to
18 backdate trades either to generate gains or losses, and that
19 was just a matter of practice.

20 THE COURT: I understand your theory of the case
21 (indiscernible) decision on it. I'm just questioning what
22 this bank file has to do with it.

23 MR. CALVANI: Well, to answer your -- I'll fall
24 back on my prior answer which is that --

25 THE COURT: (Indiscernible).

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1 MR. CALVANI: -- we believe that Mr. Shapiro made
2 representations to the bank --

3 THE COURT: All right.

4 MR. CALVANI: -- which will shed light on the fact
5 that he knew --

6 THE COURT: Got it.

7 MR. CALVANI: -- his representations were false.

8 THE COURT: Got it. Okay. Let me hear from --

9 MS. WHITE: Just a couple of points very quickly.

10 If the Trustee was really only seeking those limited
11 documents, they could've very easily -- they're very capable
12 of requesting those specific documents (indiscernible)
13 seeking the entirety of the file. And furthermore, simply
14 because Mr. Shapiro produced 10 years' worth of tax returns,
15 does not automatically allow the Trustee to search back 25
16 years --

17 THE COURT: Well --

18 MS. WHITE: -- for a variety of other financial
19 information.

20 THE COURT: But the point was made, if he's
21 already produced 10 years of tax returns, what's he fighting
22 about a privacy interest now? He's disclosed whatever
23 private interests or private information he could ever hope
24 to conceal by disclosing his tax returns.

25 MS. WHITE: The time periods at issue here, I

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1 think, are the first point on this, the fact that the 10
2 years' worth of tax returns is much more limited than what
3 they're seeking here, which --

4 THE COURT: They're seeking a loan file for two
5 loans.

6 MS. WHITE: A home equity loan that was paid back
7 over time and that has a variety of communications about the
8 payments that weren't included in any prior productions.
9 Simply because the Shapiros produced some financial
10 information doesn't mean that they've waived their right to
11 all financial information.

12 THE COURT: All right, look. I think your
13 subpoena is too broad. You haven't convinced me that this
14 entire loan file is relevant to anything in this particular
15 case. You're certainly entitled to see representations he
16 made regarding the value of his -- communications relating
17 to the value of his BLMIS account, whether they originated
18 with Bongiorno, the bank, or Mr. Shapiro, and that would
19 include any documentation he submitted relating to that.

20 If it's financial statement, you can redact the
21 other information, but where there's the item that refers to
22 the representation or the value of the BLMIS account,
23 they're entitled to see that and -- I mean, that's what
24 you're entitled to, but in light of the way you posed your
25 request and the financial privacy issues involved, I'm not

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1 inclined to force them to disclose the entire loan file. So
2 you can submit an order to that effect.

3 MR. CALVANI: We'll submit an order. Thank you.

4 THE COURT: All right.

5 MS. WHITE: Thank you very much, Your Honor.

6 THE COURT: All right. Look, I scheduled a status
7 conference. I want to move this case along and try it.
8 This one's been bouncing around forever. I fixed the time
9 for the Defendants to move her answer. It's basically it's
10 time to move this along.

11 My understanding is there are other cases which
12 may be intertwined with this particular matter. Is that the
13 case? That's why I wanted -- what's what I wanted to hear.

14 MR. KRYZOWSKI: Sure. Your Honor, Marek Kryzowski
15 of BakerHostetler. And the Trustee is not a party to this
16 case yet.

17 THE COURT: You're the first one to speak.

18 MR. KRYZOWSKI: I am because I thought I would
19 explain how the cases were intertwined and what --

20 THE COURT: Well, I know you've settlement.

21 MR. KRYZOWSKI: Right.

22 THE COURT: I'm more concerned about the issues
23 that have to be tried in this case and, you know, that might
24 have to be tried in other cases.

25 MR. KRYZOWSKI: I think I might be best to speak

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1 about that first, Your Honor --

2 THE COURT: Okay.

3 MR. KRYZOWSKI: -- if that's okay. Your Honor,
4 I've created kind of a (indiscernible). If I can just give
5 it to you --

6 THE COURT: Sure.

7 MR. KRYZOWSKI: -- because maybe that will also
8 explain what we're trying to accomplish.

9 This isn't a surprised. I had spoke -- Counsels
10 been working together, but what you see here is the Chapter
11 15 proceeding and the SIPR proceeding ultimately what we'd
12 like to substitute into the Chapter 15 proceeding for most
13 of the claims. And I'll let my adversary or I guess the
14 liquidator and my adversary explain the one issue that
15 remains afterwards.

16 Before those -- four of the claims that we'd like
17 to substitute in for which is all but the declaratory
18 judgment claims, we see the pleadings, the burdens of proof
19 to be very similar to the Trustee's claims against the
20 remaining Defendants. Over the past year I've worked with
21 Counsel for the Defendants pretty extensively on both cases
22 trying to settle out a lot of Defendants. Once we can
23 substitute in, we intend to settle with a variety of
24 Defendants in both cases, then move to amend a much more
25 streamlined complaint where there'd be a complaint in both

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1 actions, which would -- the factual section would be largely
2 the same because they arise under different statutes.

3 There'd be two complaints.

4 THE COURT: Do you have -- what I'm not getting is
5 do you have separate claims against the same Defendants in
6 an action brought by Mr. Picard?

7 MR. KRYZOWSKI: We do. Almost identical group of
8 defendants, and they would be identical I think after we
9 substituted in and could --

10 THE COURT: But are those subsequent transfer
11 claims?

12 MR. KRYZOWSKI: They are.

13 THE COURT: These claims, I assume, are breach of
14 fiduciary duty claims and contractual claims?

15 MR. KRYZOWSKI: They are.

16 THE COURT: A little different.

17 MR. KRYZOWSKI: They are. But given our pleading
18 burdens, you know, for subsequent transfer when we start
19 talking about some of these common law claims for breach of
20 fiduciary -- for most of these Defendants, they are common
21 law claims. There's only one Defendant where there -- or
22 maybe there's two Defendants where there's contractual
23 claims. All the other Defendants, it would be common law
24 claims.

25 THE COURT: You've had --

1 MR. KRYZOWSKI: In the Chapter 15 action.

2 THE COURT: Yeah, that I understand. But I
3 remember I dealt with this issue once in another context
4 with crossclaims. I think it was in the Senator and the
5 Alpha Prime (indiscernible) where --

6 MR. KRYZOWSKI: Oh, I think you did in Alpha Prime
7 and HSBC.

8 THE COURT: -- where your -- what you have to
9 prove for fraudulent transfer is a lot different and a lot
10 less complex and issues about whether or not the service
11 providers breached their fiduciary duty and, you know, what
12 the contractual requirements were or any (indiscernible)
13 issues which come up. But I guess the question I have is,
14 okay, you want to intervene in the action or take over the
15 action. Why haven't you done it in the last nine years?

16 MR. KRYZOWSKI: Well, I'll let you speak to --
17 well, why hasn't it been done in the last nine -- I don't
18 know when we had the right to. I can't speak to most of it.
19 I --

20 THE COURT: I mean you had your settlement way
21 back when.

22 MR. KRYZOWSKI: That's right.

23 THE COURT: So you could have stepped in at that
24 point and jointly prosecuted it.

25 MR. KRYZOWSKI: I agree, Your Honor. But we are

1 where we are. There's one issue preventing us from I think
2 having a stipulation where we can take over the majority of
3 that action. That's what Mr. Kazanoff wrote to you about.
4 I think that's what the issue that's holding up a
5 substitution. Until we substitute in, we can't reach a --
6 what we're trying to do with the settlement is do
7 settlements with these individuals for both actions, global
8 settlements and to avoid (indiscernible).

9 THE COURT: So why can't you do that?

10 MR. KRYZOWSKI: Well, because we don't have -- we
11 can't settle the assigned Chapter 15 claim until we're in
12 the case. That's subject to a 9019 (indiscernible).

13 THE COURT: But Mr. Molton can and you have --

14 MR. KRYZOWSKI: Well --

15 THE COURT: -- whatever agreement you had with
16 them. I don't understand.

17 MR. KRYZOWSKI: Mr. Molton couldn't because he's
18 not a party to that. He's assigned those claims. And
19 Plaintiff is Mr. Molton's client.

20 THE COURT: Okay. But he has signed those claims,
21 and when did he -- he assigned those claims, what, five
22 years ago, six years ago?

23 MR. KRYZOWSKI: Something like that.

24 THE COURT: So why didn't you step in at that
25 point if the basis of your stepping in is the assignment six

1 years ago?

2 MR. KRYZOWSKI: I don't disagree, Your Honor, and
3 I apologize. I didn't come prepared to speak to that. I've
4 been in this case for about a year. We've been working
5 towards that since I stepped into this case. I can't
6 respond to what's happened before then. Some of these
7 issues are complex. We've been trying to negotiate to
8 streamline the case and then settle them to the extent we
9 can. Since then, I think we've made a lot of progress. We
10 have to take this final step.

11 We're prepared I think once the substitution goes
12 through. You know, we've exchanged and agreed on a lot of
13 Defendants. We're prepared -- you know, settlement
14 agreement can't be signed until obviously this gets taken
15 care of, but I think in short order we would --

16 THE COURT: Well, why can't you both sign the
17 settlement agreement? I just don't understand what's
18 holding that up. That seems to be a solvable problem. If
19 you want to settle, both of you sign the agreement and you
20 waive -- both of you waive your rights and then you have
21 whatever deal you have to split up the money.

22 MR. KRYZOWSKI: Well, look, I suppose we could do
23 that if we can't accomplish the substitution then. Again, I
24 wanted to go forward with what our -- what we plan to do
25 going forward to try and streamline this in terms of getting

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1 over the obstacle that exists between my colleagues here, I
2 can't -- as I said, I'm not even really a --

3 THE COURT: Right.

4 MR. KRYZOWSKI: -- party here yet.

5 THE COURT: So why are you speaking to it?

6 MR. KRYZOWSKI: Because it looked to me and I
7 thought if we started out with the commonality, I thought
8 that would be the easier way to streamline it.

9 THE COURT: What you have told me --

10 MR. KRYZOWSKI: Yes.

11 THE COURT: -- is that you want to be substituted
12 or you will be substituted or the liquidator shall assign
13 their claims to you, that you're all but named the Plaintiff
14 in this case. But I don't understand what that has to do
15 with why this case is still bouncing around all this time.

16 Let me hear from the Defendants in terms of -- I
17 mean you haven't answered yet and this -- you've got to
18 answer or move.

19 MR. KAZANOFF: Your Honor, Peter Kazanoff from
20 Simpson Thacher. We have also been frustrated with the pace
21 of this case.

22 THE COURT: So why don't you just answer or move?

23 MR. KAZANOFF: Because we understood that the
24 complaint would be -- we've been told for years that the
25 Trustee would be moving in to the action and would file an

1 amended complaint. And so we did want to extend the
2 resources responding to a complaint that we understood they
3 were going to seek to amend.

4 THE COURT: Well, that excuse is getting a little
5 moldy here.

6 MR. KAZANOFF: Understood, Your Honor. We have
7 wanted to move this case forward for quite some time.

8 THE COURT: All right. Well --

9 MR. KAZANOFF: The other issue, which perhaps I'm
10 best to speak to is an issue related to some deferred fees.
11 And if you'll --

12 THE COURT: Deferred fees?

13 MR. KAZANOFF: Yeah, deferred fees. If you'll
14 humor me, let me give you a timeline here. So in 200- --
15 May of 2009, the liquidator had removed an action that had
16 been filed against Fairfield Greenwich Defendants in state
17 court into the Chapter 15 proceeding. There is a
18 declaratory judgment claim within that complaint that seeks
19 a declaratory judgment that the liquidator or Sentry does
20 not owe certain fees that were deferred by Fairfield
21 Greenwich.

22 So Fairfield Greenwich has a claim --

23 THE COURT: Right.

24 MR. KAZANOFF: -- pursuant to a separate contract,
25 a deferred fee agreement for sums of money. They sought a

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1 declaratory judgment that those monies were not owed.
2 Fairfield Greenwich put a claim in in the liquidation
3 proceeding in the BVI for those claims. Ultimately, the
4 liquidator rejected those claims and --

5 THE COURT: These are fees that --

6 MR. KAZANOFF: These are for the claims for the
7 deferred fees.

8 THE COURT: Okay.

9 MR. KAZANOFF: Fairfield sought to, for lack of a
10 better phrase, appeal that decision to the BVI court. At
11 that time, the liquidator's claim here was still -- the
12 complaint had a declaratory judgment saying those deferred
13 fees were not owed.

14 THE COURT: What governs that determination? I
15 assume this is contractual.

16 MR. KAZANOFF: Correct. That's a New --

17 THE COURT: And what law governs that contract?

18 MR. KAZANOFF: It's a New York law contract.

19 THE COURT: Oh, okay.

20 MR. KAZANOFF: It's a New York law contract. And
21 we looked back at the assignment which is the only
22 information we've ever had about the arrangements between my
23 colleagues on the other side of the V here. And when you
24 look back at the assignment, it says they're assigning all
25 the claims against my clients asserted in this action and

1 then it has sort of a curious description. It says
2 "including but not limited to the Fairfield Funds claims
3 for." And it goes through all the causes of action except
4 the cause of action seeking a declaratory judgment with
5 respect to the deferred fees.

6 THE COURT: Well, why would they assign a claim
7 like that?

8 MR. KAZANOFF: We didn't --

9 THE COURT: They're not assuming liability for
10 those deferred fees.

11 MR. KAZANOFF: And we had understood that we would
12 be -- that that issue had been joined by the liquidator in
13 this court and we were not seeking to litigate our
14 entitlement to the deferred fees twice.

15 THE COURT: Right.

16 MR. KAZANOFF: We didn't want to litigate it in
17 front of Your Honor and also in front of a BVI court.

18 THE COURT: What did the BVI -- was this raised
19 with the BVI court?

20 MR. KAZANOFF: We've never raised the issue with
21 the BVI court in the sense that we agreed with the
22 liquidator to stay that proceeding in the BVI pending Your
23 Honor's determination with respect to the deferred fees.

24 THE COURT: How am I going to make that
25 determination?

1 MR. KAZANOFF: We now understand that you are not
2 going to make that determination with respect to the
3 deferred fees. We --

4 THE COURT: Why not?

5 MR. KAZANOFF: That you are not, Your Honor. We
6 do not expect you are because --

7 THE COURT: Well, I assume that you'll respond --
8 if you respond to the complaint, you'll either say that
9 we're entitled to -- they're not entitled to the declaratory
10 judgment they're seeking or that you don't need a
11 declaratory judgment because maybe it's caught up in one of
12 the contract claims or something else.

13 MR. KAZANOFF: Understood, Your Honor. So what we
14 did is we -- once we understood, which was this year in
15 2018, that definitively the Trustee did not intend to
16 prosecute the declaratory judgement action --

17 THE COURT: Yeah, but he has no reason to.

18 MR. KAZANOFF: We have since approached the
19 liquidator and said now that that claim will not be
20 prosecuted within this Chapter 15 proceeding, we ask you to
21 lift the stay so we can proceed on the BVI and that claim.
22 Alternatively, we would -- and I mean alternatively -- I
23 don't want to do it in two places, we would proceed on that
24 claim against Century in this -- within the Chapter 15
25 proceeding. But it's our affirmative claim. We get to

1 pursue it somewhere.

2 THE COURT: Yeah. Well, normally, you would think
3 you'd pursue it in the insolvency court. Why don't you just
4 make a motion for relief from the stay under the recognition
5 order and if that's what it takes. I don't know if the BVI
6 court is saying they'll defer to this court because it's a
7 New York claim or it's wrapped in an adversary proceeding.

8 MR. KAZANOFF: I don't --

9 THE COURT: But you guys have to figure that out.

10 MR. KAZANOFF: But that's -- our only issue, Your
11 Honor, with respect to substitution because we are not
12 seeking to delay this case. I agree with Mr.
13 (indiscernible) that the proper -- not proper, that's the
14 wrong word.

15 THE COURT: Expeditious.

16 MR. KAZANOFF: The most expeditious approach here
17 would be to effect these settlements, get the individuals
18 out that are getting out, get a new amended complaint that
19 we would either oppose the amendment or more likely move to
20 dismiss, and we can get on with this, which is what we have
21 wanted as well.

22 Our issue, Your Honor, though, is we can't stand
23 by and let the substitution happen without expressing our
24 very strong belief that that substitution plus this consent
25 decree in the BVI cannot eliminate our right to seek these

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1 deferred fees. Because what I understand the liquidator,
2 the position he's going to take, I believe, is that we get
3 to assert it as a setoff to Mr. Picard's claim. Once Picard
4 substitutes in for Century in this action.

5 That's not a solution. It's our affirmative
6 claim.

7 THE COURT: I understand. No, I understand that,
8 but let me come back to the settlement or the substitution.
9 That seems to be an issue that doesn't affect the ability to
10 settle these cases. They can both -- if they agree they can
11 both settle the claim and then just waive any rights or
12 release any claims jointly. But, you know, I know you're
13 Defendants and while you're telling me, gee, you'd really
14 like to have this resolved, I suspect that you'd rather that
15 it's never resolved.

16 MR. KAZANOFF: Listen, it's not lost on us that
17 it's ten years, Your Honor.

18 THE COURT: Right.

19 MR. KAZANOFF: And just to be clear, what our
20 concern on substitution is we do not want the effect of the
21 substitution to be that Century has now exited our adversary
22 proceeding that we have and that our ability to pursue the
23 claim in the BVI has -- is in limbo because we're still
24 litigating with the Trustee Century's claims. We can't be
25 -- lose our ability to pursue those --

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1 THE COURT: I hear you. This talk of substitution
2 is entirely hypothetical to me at this point. I have a case
3 that's been pending for nine years. It's time to answer and
4 move. If they're going to substitute, that's their business
5 but it just can't hold up this case anymore. So fire
6 answers or make you motions to the extent I don't know how
7 many defendants are left in these actions.

8 MR. KAZANOFF: There will be a number of
9 defendants left. What we would ask, Your Honor, is that --
10 and we understood clearly what you put on our stipulation.
11 We get it. What I would respectfully say is that we
12 shouldn't have to respond to a complaint that the Trustee
13 has clearly said they are going to amend.

14 THE COURT: Well, I disagree. And not -- and I
15 hear you about efficiency and all that, but he hasn't
16 amended it. And who knows if he'll ever amend it. Who
17 knows if he'll ever be substituted. I don't know. You
18 know, if he seeks to amend, you can argue delay as a reason
19 not to permit him to amend if that's what you want to do --

20 MR. KAZANOFF: Your Honor

21 THE COURT: -- aside from futility and whatever
22 else and prejudice.

23 MR. KAZANOFF: I understand. I'm asking you for
24 -- I'm not asking. Let me suggest my point is is that --

25 THE COURT: You want him to go first but he hasn't

1 done anything. So just --

2 MR. KAZANOFF: If he substitutes in and there is
3 an amended motion for amended complaint, we would ask that
4 we be given time to look at that complaint and decide how
5 we're going to respond with respect to the parties that are
6 still in the case at that time.

7 THE COURT: Tell you what. If that comes to pass
8 before your time to answer or move occurs, you can certainly
9 write me a letter and we'll have a conference on that. But
10 nothing has changed in all these years, so file an answer or
11 make your motion. If you're going to file a motion, you
12 know, if there are a lot of defendants here and they're
13 going to file a motion on the same issue, then I ask that
14 you file an omnibus brief which is -- on those common issues
15 which is the way we've usually proceeded in these cases
16 anyway.

17 MR. KAZANOFF: We would always seek to try to make
18 things (indiscernible). The one thing, Your Honor, though,
19 and I think we can move forward on this very quickly and
20 there won't be any of these complications is we need some
21 level of comfort that consenting to the substitution has not
22 put us into this situation where we have lost -- somehow
23 lost our right.

24 THE COURT: There's no substitution.

25 MR. KAZANOFF: But it's going to happen. I think

1 Mr. Kryzowki's going to tell you he's going to either
2 substitute on consent or he's going to have to move to
3 substitute.

4 THE COURT: All right. Well, then you can object
5 to it. In other words, if the terms of the substitution,
6 express or implied, prejudice you for the reasons you've
7 stated, you can object to the substitution unless it's, you
8 know, it's clarified that you can proceed with your claim in
9 the BVI or you can assert it as a setoff against the Trustee
10 or whatever, you know, whatever it is. But I don't have
11 that motion here and I'm not going to wait any longer.

12 MR. KAZANOFF: Understood, Your Honor.

13 THE COURT: All right. I'm glad we're in
14 agreement on that.

15 MR. KAZANOFF: Do we get to -- I would like to
16 hear the liquidator's position with respect to our ability
17 to pursue the deferred fee claims. I would like that to be
18 on the record.

19 THE COURT: In the BVI or here?

20 MR. KAZANOFF: Here or in the BVI, whatever it is,
21 because that's the central issue from our perspective.

22 THE COURT: That's a fair request. How much is
23 involved in these deferred fees?

24 MR. MOLTON: Judge, I think it's \$26 million.

25 THE COURT: Okay. So where's he going to pursue

1 his deferred fees claim?

2 MR. MOLTON: Judge, they agreed that they would
3 basically pursue that issue here. And just to -- I want to
4 just take --

5 THE COURT: But how did --his question was if
6 there's -- that's fine as long as nothing changed, but his
7 concern is that if there's some sort of substitution and it
8 doesn't include this declaratory judgment claim because it's
9 not really a claim he has against the -- you know, SIPC
10 estate or against BLMIS. That's a claim he has against you,
11 and he's concerned that somehow he will lose the ability to
12 prosecute this. I realize this is all --

13 MR. MOLTON: Hypothetical.

14 THE COURT: -- dependent on what the terms of the
15 substitution are. But so where's he going to litigate his
16 claim? Where do you contemplate he's going to litigate his
17 claim?

18 MR. MOLTON: This is how we see it, and first of
19 all, we've been working very hard by the way in good faith
20 to try to untie this (indiscernible), and it may that we'll
21 be able to do that in the next few weeks and avoid motion
22 practice. But in any event, Your Honor, Mr. Kazanoff is
23 right is that the FG and I'll give you a little procedural
24 history and then I'll tell you the answer.

25 THE COURT: All right.

1 MR. MOLTON: Two FG entities brought proof of
2 claims, proof of debts they call them, in the BVI asserting
3 two separate claims, indemnification under their management
4 agreements and associated agreements, and deferred fee and a
5 deferred fee claim which relates to approximately what we
6 understand to be what they claim to be \$26 million of
7 performance fees and management fees that they say they're
8 entitled to off of the fictitious profits that were
9 accounted for as a result of the Madoff fraud.

10 Twenty percent performance fees, and I think less
11 than a one percent --

12 THE COURT: Wasn't there a similar issue in
13 Kingate?

14 MR. MOLTON: There were similar issues, Your
15 Honor.

16 THE COURT: I remember that with (indiscernible).

17 MR. MOLTON: There were similar issues and Your
18 Honor just wrote about some of those issues in a different
19 context.

20 THE COURT: Right.

21 MR. MOLTON: But in any event, the indemnification
22 matter went forward. The liquidator objected and as Your
23 Honor knows, there's a procedure in BVI called Section 273
24 that if you don't like what the liquidator does, you use
25 that procedure to object. That went forward. That went to

1 trial. I think --

2 THE COURT: I thought there was an injunction
3 procedure --

4 MR. MOLTON: They --

5 THE COURT: You couldn't prevent them from coming
6 here --

7 MR. MOLTON: That was the redeemer defendants, but
8 273's the vehicle --

9 THE COURT: Okay.

10 MR. MOLTON: -- for which you can oppose the
11 liquidator suing in the United States opposing his
12 disallowance of claim under BVI.

13 THE COURT: I've got it.

14 MR. MOLTON: Whatever. So that's a procedural
15 vehicle. That went forward and they threw a lot of
16 indemnification into that bucket, including costs from the
17 (indiscernible) litigation, the class action, included all
18 sort of other millions and millions and millions and
19 millions of dollars of cost. That was adjudicated by the
20 BVI court. I think one indemnification survived, claim
21 survived, and that was in connection with the Morning Mist
22 derivative action going back to a decade. And that
23 survived, and that went up. They appealed that to the
24 Eastern Caribbean Court of Appeal which affirmed the BVI
25 court. And I believe they just settled out with the

1 liquidator on the Morning Mist indemnification claim.

2 THE COURT: So the indemnification issue is done?

3 MR. MOLTON: Well, I don't know. I think they
4 still -- I asked that question because I thought Your Honor
5 might ask that question. I think --

6 THE COURT: Regarding the privy counsel?

7 MR. MOLTON: -- they still might have some time to
8 go to privy counsel. I don't know if they will or they
9 won't.

10 THE COURT: But you said they settled the --

11 MR. MOLTON: They settled --

12 THE COURT: Okay.

13 MR. MOLTON: -- one aspect of it but I don't think
14 the other aspects of that. The deferred fee action, Your
15 Honor, and I know my friend Mr. Kazowitz said it's a
16 separate contract.

17 THE COURT: Kazanoff.

18 MR. MOLTON: Kazanoff. Why did I say Kazowitz?

19 MR. KAZANOFF: (Indiscernible) Kazowitz's lawyer.

20 MR. MOLTON: Kazanoff. Mr. Kazanoff said it's a
21 separate contract, and it is a separate contract. I think
22 there's a 2003 contract --

23 THE COURT: Just where he's going to -- all I want
24 to know is where -- he wants to know where he's going to
25 litigate it.

1 MR. MOLTON: Yeah. But I'm going to get to that
2 point right now if Your Honor suffers with --

3 THE COURT: Okay, please. It's the afternoon
4 already.

5 MR. MOLTON: We waited a long time.

6 THE COURT: Well --

7 MR. MOLTON: In any event, Your Honor, they
8 approached us and said let's not litigate this in the BVI.
9 The issue will be litigated in front of Your Honor, and it
10 will, because the issue that although the deferred fee issue
11 results in a separate contract and that contract talks about
12 election of deferred fees, how people are entitled to them,
13 the ultimate entitlement to the fee itself is the very issue
14 of the contract claims and the unjust enrichment claims and
15 the constructive trust claims and the breach of fiduciary
16 duty claims that are being assigned to Mr. -- that have been
17 assigned to Mr. Picard, meaning if Your Honor looks at that
18 complaint that's in the case in front of us, there's -- the
19 complaint seeks the return of \$919 million of fees that were
20 paid to the Defendants pursuant to the same agreements that
21 they're saying entitle them to the deferred fees.

22 So the adjudication of that litigation in front of
23 Your Honor is going to resolve that issue.

24 THE COURT: If the Trustee is wrong and they're
25 right, where do they collect from?

1 MR. MOLTON: If they're right and the Trustee's
2 wrong, Mr. (indiscernible) has -- the liquidator has
3 accepted and agreed in the stay order that Your Honor's
4 determination as to that issue will be binding on the
5 liquidator.

6 THE COURT: So he can go back or the client can go
7 back to BVI and collect whatever the percentage
8 distribution.

9 MR. MOLTON: Correct. And I'm sure the client
10 wouldn't even have -- I'm sure Mr. Kazanoff wouldn't even
11 have to go back and call me up. He'd send me the judgment
12 and --

13 THE COURT: And you'd write him a check?

14 MR. MOLTON: And Mr. (indiscernible) would take
15 care of it.

16 THE COURT: All right. Does that answer your
17 question, Mr. Kazanoff?

18 MR. KAZANOFF: It does not.

19 THE COURT: In what way doesn't it answer your
20 question?

21 MR. KAZANOFF: Well, basically --

22 THE COURT: He's saying the entitlement to the fee
23 is going to be determined if the Trustee takes over the case
24 because it's wrapped up with this question of whether you're
25 entitled to fees at all.

1 MR. KAZANOFF: And I'm not --

2 THE COURT: Which would be a defense to I guess
3 the fraudulent -- you know, the subsequent transfer actions
4 or breach of fiduciary duty actions.

5 MR. KAZANOFF: Is there potential overlap here --
6 actually, of course, I'm not going to say that these --
7 there's different law that applies to these agreements,
8 okay, the investment management agreements that Picard is
9 going to be suing under. There's, I believe, four of them
10 here. There's different law that applies. It's also that
11 the timing is going to matter right here because the
12 deferred fees were owed over different time periods. Those
13 claims will be pursued over different time periods. It
14 isn't that the determination of the claims that are -- the
15 affirmative claims asserted against my clients will
16 necessarily govern the deferred fees.

17 THE COURT: Well, he's going to -- just on
18 fraudulent transfer claims which are more familiar. I
19 assume your clients are being used as subsequent transferees
20 for the Trustee?

21 MR. KAZANOFF: Correct. In the Picard action.

22 THE COURT: In the Picard action and either he or
23 you. I'm not clear on the burden of proof. I think I know
24 what the burden of pleading is. But the issue of your --
25 you're taking or receiving that money in good faith, putting

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1 aside value for the minute, is going to be an issue. If he
2 proves that you lacked good faith and that you had knowledge
3 of the avoidability of the initial transfers, are you saying
4 you're still entitled to fees?

5 MR. KAZANOFF: Well --

6 THE COURT: Because that was the issue that came
7 up in Kingate.

8 MR. KAZANOFF: And I understood, and I read that
9 opinion before I came here today, Your Honor. My point is
10 is what I understand they're proposing is that the
11 determination of a hypothetical complaint that hasn't been
12 filed yet, I don't know what claims are going to be --

13 THE COURT: Well, that's why I said this is all
14 hypothetical. File your answer and make your motion.

15 MR. KAZANOFF: But they're saying that a complaint
16 will contain claims, and here we're not talking necessarily
17 about Mr. Picard's subsequent transfer claims in the SIPC
18 proceeding. We're talking about the liquidator's claims
19 that he -- Mr. Picard is taking on assignment. He's telling
20 -- I've been told that they're not going to assert the
21 declaratory judgment claim with respect to deferred fees. I
22 don't know which of the other claims they're going to
23 assert. I don't know over what time periods.

24 It is entirely premature to deny us the right to
25 pursue an affirmative claim based on what may be argued in

1 opposition to the complaint.

2 THE COURT: I've heard -- this is what we'll do.
3 You file your answer or your motion. If you make a
4 substitution motion, as part of that motion, you should
5 submit a proposed amended complaint so then we'll have some
6 more specific context about how the proposed substitution
7 and amended complaint may affect the specific right that
8 they're raising. And it may be that, you know, although you
9 don't technically have your deferred compensation claim in
10 whatever is being assigned to the Trustee, the determination
11 of that suit is going to determine your claim because your
12 issue of good faith, knowledge are all going to be issues in
13 the Trustee's case.

14 MR. KAZANOFF: I understand what you're saying,
15 Your Honor. Can I ask one follow-up question just because
16 we've been wrestling with this issue for six months? If
17 there is a substitution by the Trustee and for the
18 liquidator, can we be confident that we can still assert an
19 affirmative claim for our deferred fees against the
20 liquidator or have we somehow given up that right?

21 THE COURT: Well, the -- as I understand it, the
22 stipulation was entered into under the understanding that
23 the liquidator would be filing these claims, right, would be
24 prosecuting this particular adversary proceeding.

25 MR. KAZANOFF: It reads as it reads. Our

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1 understanding was that the deferred fee claim would be
2 decided.

3 THE COURT: But that is in the context of a
4 declaratory judgment issue, right?

5 MR. KAZANOFF: Correct.

6 THE COURT: So if that comes out of the
7 litigation, maybe it's time to take another --

8 MR. KAZANOFF: Right.

9 THE COURT: -- look at the stipulation.

10 MR. KAZANOFF: But I --

11 THE COURT: Okay. As a change in circumstances.

12 MR. KAZANOFF: That is certainly how we view it.

13 THE COURT: All right.

14 MR. KAZANOFF: And but the one point is it has
15 been in our view of the --

16 THE COURT: Somebody's got to get the last word
17 and then nobody else can. I see you jumping up, Mr. Molton.

18 MR. KAZANOFF: Well, maybe I should let him speak.

19 MR. MOLTON: He knows me too well. His Honor
20 knows me too well.

21 MR. KAZANOFF: We just in looking at the
22 procedural rules here, it is somewhat unclear whether we can
23 assert what would happen. Let's say we answer and let's say
24 we assert a counterclaim for our deferred fees.

25 THE COURT: Another hypothetical.

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1 MR. KAZANOFF: Another hypothetical against the
2 liquidator. And now Picard seeks to substitute in to the
3 action to prosecute the claims that he believes he took on
4 assignment. It's a little unclear to us --

5 THE COURT: You make a motion to abstain on that
6 issue and have the BVI court decide it. Somebody's got to
7 decide it first, okay. All right.

8 MR. KAZANOFF: Thank you, Your Honor.

9 THE COURT: Thank you very, very much. I look
10 forward to reading your motions and/or answer.

11 MR. KRYZOWSKI: Thank you, Your Honor.

12 THE COURT: Thank you.

13 MR. MOLTON: Thank you, Your Honor.

14 THE COURT: Thank you.

15 (Whereupon these proceedings were concluded at
16 12:11 PM)

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1 I N D E X

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3 RULINGS

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6 Oral motion to withdraw the claim with 56 1
7 prejudice is granted

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1 C E R T I F I C A T I O N

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3 I, Sonya Ledanski Hyde, certified that the foregoing
4 transcript is a true and accurate record of the proceedings.

5

6 **Sonya**
7 **Ledanski Hyde**

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8 **Sonya Ledanski Hyde**

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25 **Date: December 20, 2018**